Supreme Court, U.S.
FILED

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No. ———

In The

Supreme Court of the United States

THE COUNTY OF SCHENECTADY, NEW YORK,

Petitioner,

v.

CHRISTOPHER JEFFES, JOHN KEENAN, JR., AND JERRY CARLOS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can alleged action by a County Sheriff fostering a "code of silence" among Corrections Officers at the Jail be official municipal policy under *Monell* when such an action is a violation of the New York State penal law and when the Sheriff is responsible for such action solely to the New York State Commissioner of Corrections and the Corrections Commission?

LIST OF PARTIES

Petitioner is The County of Schenectady, New York.

Respondents are Christopher Jeffes, John Keenan, Jr., and Jerry Carlos.

Defendants William Barnes, Sheriff of the County of Schenectady; Harry Buffardi, Undersheriff of the County of Schenectady; Robert Elwell, Sr., a Major in the Schenectady County Sheriff's Office; unnamed employees of the County of Schenectady (sued as John Doe) are not involved in this petition.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Citations to Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Statement of Facts 2

Proceedings in the Courts Below 6

Reasons Petition for Writ of Certiorari Should Be Granted 7

I. The Sheriff is not the final Policymaker for the enforcement of the alleged "code of silence" ... 8

1. The New York State Commissioner of Corrections is the final policymaker for the administration of the Jail 10

2. The existence of a "code of silence" and the actions allegedly taken by the Sheriff implicate the integrity of the Jail and the safety of the inmates; areas where the New York State Corrections Commissions has final policymaking authority 11

II. The action allegedly taken by the Sheriff were illegal and cannot be fairly said to represent official municipal policy 14

TABLE OF CONTENTS – Continued

Page

1. The Sheriff is an Officer of the Court and action taken contra to his duties as such cannot represent official policy 15

2. The Sheriff's action was illegal and cannot represent official policy 16

CONCLUSION 18

Appendices

A. Opinions and Judgments Below.....App. 1

B. Statutes Involved..... App. 72

TABLE OF AUTHORITIES

Page

CASES

Brown v. Neumann, 188 F.3d 1289 (11th Cir. 1999) . . 9, 13

Mandel v. Doe, 888 F.2d 783 (11th Cir. 1989) 9

Monell v. Department of Social Services, 436 U.S. 658 (1978) 7, 8, 9, 14, 17

Pembaur v. City of Cincinnati, 475 U.S. 496 (1986) 8, 16

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 9

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 2, 6, 17

New York Correction Law § 40 . . . . . 2, 10

New York Correction Law § 45 . . . . . 2, 11, 12

New York Correction Law § 112 . . . . . 2, 10

New York Correction Law § 500-c 2, 10

New York County Law § 650 . . . . . 2, 15

New York Penal Law § 195 . . . . . 2, 7, 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner, The County of Schenectady, prays that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above case on March 28, 2000.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 2000 U.S. App. Lexis 5150 and is presented in its entirety in Appendix A, *infra*, at pages App. 1 – App. 32. The Memorandum Opinion and Order of the United States District Court for the Northern District of New York is reported at 20 F.Supp.2d 404 and is presented in its entirety in Appendix A, *infra*, at pages App. 33 – App. 71.

JURISDICTION

The United States District Court for the Northern District of New York, entered judgment on September 15, 1998, granting the County of Schenectady's Motion for Summary Judgment. The United States Court of Appeals for the Second Circuit reversed and remanded on March 28, 2000. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Statutes involved are 42 U.S.C. § 1983; New York Correction Law § 40; New York Correction Law § 45; New York Correction Law § 112; New York Correction Law § 500-c; New York County Law § 650; New York Penal Law § 195. The language of these statutory provisions is set forth in Appendix B, *infra*, at pages App. 72-84.

STATEMENT OF THE CASE

Statement Of Facts

Plaintiffs in this action, Christopher Jeffes, John Keenan, Jr. and Jerry Carlos, were employed as Schenectady County Corrections Officers. (App. 1, 2). They allege that during the course of their employment they were deprived of their civil rights by the defendants. (App. 2) The defendants are William Barnes, Sheriff of the County of Schenectady (hereinafter "Sheriff"); Harry Buffardi, Undersheriff of the County of Schenectady; Robert Elwell, Sr., a Major in the Schenectady County Sheriff's Office; unnamed employees of the County of Schenectady (sued as John Doe); and the County of Schenectady (hereinafter "Schenectady County" or "County"). (App. 1, 2)

On April 29, 1994, an alleged incident of inmate abuse occurred at the Schenectady County Jail. (App. 3-5). During a transfer between buildings, prisoners were allegedly beaten. (App. 3-5). As a result of this incident, an investigation was conducted by the Commission of Correction (hereinafter "Correction Commission") and

the Federal Government. (App. 3-5). The Correction Commission is a New York State agency charged with ensuring the integrity and safety of State correctional facilities. (App. 79)

The Sheriff testified at his deposition that he was required to, and did, notify the Correction Commission immediately after the incident. (Barnes 300-302[1]) The federal investigation led to criminal charges and the indictment of four officers allegedly involved in the beatings. (App. 6) Each individual plaintiff participated to a varying degree with the investigation. (App. 5, 6)

It is each plaintiff's position that his cooperation with the Federal Government in this criminal matter was an exercise of his First Amendment right of free speech under the United States Constitution. (App. 2) Plaintiffs assert that these rights were violated when alleged acts of retaliation were taken due to this cooperation. (App. 2)

Plaintiffs allege a pattern of retaliation by other employees, intolerable work conditions, elimination of duties and responsibilities, denial or frustration of applications for County benefits and subjection to the posting of signs and posters at their place of employment. (App. 7-10)

Jeffes alleges that Sheriff Barnes relieved him of some of his duties as a lieutenant, the Sheriff suspended him

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[1] References to the deposition transcript of Sheriff William Barnes taken September 5, 1997 will be cited as "Barnes".

for five days without pay, that his 207-C application[2] claiming an anxiety disorder was disapproved and that a poster was hung depicting him which stated "deathwish" and something to the effect that "I want to die." (App. 7-10) These incidents allegedly occurred following Jeffes' appearance on a local newscast in early November, 1994. (App. 7-10)

Jeffes was absent from work without authorized leave beginning December 10, 1994. (SA 3[3]) Jeffes then filed a 207-C application seeking full pay benefits, claiming an anxiety disorder with a date of accident of November 30, 1994. (SA 2-12) The 207-C application was disapproved, but Jeffes did not return to work. Jeffes thereafter appealed this determination by demanding an arbitration. (A 2369-2370[4]) This appeal was rejected by the New York State Supreme Court, Appellate Division, Third Department. (A 2370)

On August 12, 1997, Jeffes was ordered to return to work on August 18, 1997, but refused to do so. (SA 3) He was then served a Notice of Disciplinary Action dated August 25, 1997, stating that he had been absent from work without authorized leave since December 10, 1994. (SA 3-4) Because his conduct violated the Department's

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[2] 207-C is a benefit provided to correction officers who have been injured in the line of duty [A2714].

[3] All references to "SA" refer to the Supplemental Joint Appendix that constituted part of the Record on Appeal before the Second Circuit.

[4] All references to "A" refer to the Appendix that constituted part of the Record on Appeal before the Second Circuit.

Code of Conduct, Jeffes was terminated effective August 31, 1997. (SA 3-4)

Keenan testified at his deposition that a few days after the criminal trial which took place in the summer of 1996, he removed copies of a drawing posted at the Jail labeled "home of the cheese eaters" containing the names of his and other correction officers on six occasions. (A 2533) Keenan also testified that a few days after the criminal trial, attempts were made to interrupt his radio communications at the Jail. (A 2533) Keenan testified that he stopped working at the Jail on July 23, 1996 because he was having a panic attack. (A 2537)

Keenan then applied for 207-C benefits which was disapproved upon the basis that there was insufficient medical evidence to document that the alleged condition/disability was causally related to the job duties of a correction officer and that medical reports suggested the condition was pre-existing and longstanding. (SA 14-21) Keenan took no immediate action in response to this denial of benefits, but remained out of work. (SA 22)

On June 27, 1997, Keenan was ordered to return to work on July 2, 1997. (SA 22) When he did not, a Notice of Disciplinary Action was served upon him dated July 7, 1997 notifying him of his termination, effective July 7, 1997. (SA 23) Keenan then filed a demand to arbitrate the return to work order. (SA 24) The Sheriff's petition to stay the arbitration was granted by New York State Supreme Court. (SA 24-27)

Carlos, who continues to work as a correction officer at the Jail, testified that people called him "rat" and "snitch" over the radio and when he walked by the

lunchroom on April 29, 1995, the day after he first spoke to the FBI. (A 1028-1029) Carlos also testified that he saw signs posted at the Jail depicting a rat with his name on it, that the radio work was clicked off when he was trying to speak and that he was incorrectly accused of ripping up mail and sleeping on duty. (A 1061-1067)

The Sheriff identified the "Green Book," at his deposition. The "Green Book" is a manual generated by the Correction Commission which governs how a jail is run and the minimum standards for corrections facilities (Barnes 44-47). The Sheriff acknowledged his obligation to notify the Correction Commission immediately after the alleged incidents of inmate abuse.

Proceedings in the Courts Below

Plaintiffs brought suit on February 19, 1997 in the United States District Court for the Northern District of New York under 42 U.S.C. § 1983 alleging deprivation of their civil rights. (App. 2) An order was entered on September 15, 1998 granting Defendant Schenectady County's motion for Summary Judgment. (App. 33-74) In granting Summary Judgment to the County, the District Court held that the Sheriff was not the final policymaker with respect to the actions complained of by plaintiffs. (App. 63-68) More specifically, the actions complained of related to employment and personnel issues; areas in which the Sheriff cannot be considered the final policymaking official. (App. 63-68)

Plaintiffs filed a Notice of Appeal from the lower Court's grant of summary judgment on September 29, 1998. The Second Circuit reversed and remanded on

March 38, 2000. (App. 1-32) In doing so, the Second Circuit held that the Sheriff is a final policymaker for jail employees' conduct toward one another and the enforcement of any "code of silence." (App. 24)

Schenectady County's motion to Stay Issuance of the Court's mandate pursuant to FRAP 41(2) was granted on April 28, 2000, and the United States Court of Appeals for the Second Circuit's mandate has been stayed until May 11, 2000 pending filing of this petition.

REASONS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

The Second Circuit held that the Sheriff had final policy making authority for the enforcement of a "code of silence" at the jail. (App. 24) Thus, the County may be held liable for the injuries caused by the actions allegedly taken by the Sheriff. (App. 24) The effect of this holding is that Schenectady County may be liable based upon action by the Sheriff, which if true, is a violation of New York Penal Law § 195 and for which the Sheriff is solely responsible to the New York State Commissioner of Correction and Correction Commission.[5] This, in reality, is the *respondeat superior* theory impermissible under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

[5] The New York State Commissioner of Correction and The New York State Correction Commission are two separate entities. The policy allegedly instituted by the Sheriff, and the action taken in furtherance of this policy, infringe on areas where both the Commissioner and the Commission are the final policymakers.

The policy for which the Second Circuit determined the Sheriff to be the final policymaker was an alleged "code of silence." (App. 24) Such a policy is one where, without punishment, officers harass and intimidate other officers who cooperate with investigations into the alleged illegal acts of fellow officers. Schenectady County did not authorize by law, or otherwise, the implementation of a "code of silence." Thus neither the Sheriff, nor any County official has final policymaking authority to promulgate a "code of silence."

However, even assuming that a "code of silence" could be implemented, the Sheriff would be responsible to the New York State Commissioner of Correction and Correction Commission for action taken in furtherance of this policy. Finally, because a "code of silence" is a violation of New York State Penal Law and the Sheriff is an officer of the Court, it cannot represent official municipal policy. Thus, a finding of municipal liability is based on the *respondeat superior* theory not allowed under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

I. THE SHERIFF IS NOT THE FINAL POLICYMAKER FOR THE ENFORCEMENT OF THE ALLEGED "CODE OF SILENCE"

A municipality cannot be held liable for the acts of its employees on a theory of *respondeat superior. Monell v. Department of Social Services*, 436 U.S. 658. However, if the employee is shown to have final policymaking authority for the actions taken, liability may attach. *Pembaur v. City of Cincinnati*, 457 U.S. 496 (1986). Liability cannot be

imposed solely because an employee is given the authority to exercise discretion. *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Rather, as the Eleventh Circuit has stated, "the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies and are not subject to review." *Brown v. Neumann*, 188 F.3d 1289 (11th Cir. 1999) *quoting Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989) *citing Praprotnik, supra.*

Here, the Second Circuit concluded that the Sheriff was the final policymaking official for staff member's duties and obligations toward each other and the enforcement of a "code of silence". (App. 23-24) Assuming *arguendo* that a government official does have final policymaking authority for the conduct at issue; the Sheriff is not this official.

The Sheriff is responsible to the New York State Commissioner of Correction for the administration of the jail. The institution of a "code of silence" is an area where the Sheriff answers only to the Commissioner of Correction. The existence of a "code of silence", and the action allegedly taken by the Sheriff in furtherance of this policy, affect the integrity and safety of the jail. For these areas, the Correction Commission is the final policymaking authority.

Because the Sheriff answers to the Commissioner of Correction and the Correction Commission, he cannot be the final policymaker for a "code of silence". Therefore, the Second Circuit's imposition of liability on the County does not conform with *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

1. The New York State Commissioner of Correction is the Final Policymaker for the Administration of the Jail.

New York law provides that "the Sheriff of each county shall have custody of the county jail of such county." *See* N.Y. Correction Law § 500-c, (App. 73). The Sheriff is the chief administrative officer of the prison. He is required to receive and safely keep in the county jail each person lawfully committed to his custody. *See* N.Y. Correction Law § 500-c. (App. 73) However, ultimate rulemaking power rests with the Commissioner of Correction.

The Schenectady County Jail is a correctional facility for the purposes of the New York State Correction Law. See N.Y. Correction Law § 40. (App. 75, 76) Under N.Y. Correction Law § 112(1) "The Commissioner of Correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal policies thereof." *See* N.Y. Correction Law § 112(1). (App. 77, 78) The Correction Law further empowers the Commissioner with the "duty to inquire into all matters connected with said correctional facilities". (App. 77, 78)

Finally, New York Law confers upon the Commissioner the authority to "make such rules and regulations . . . for the government of the officers and other employees of the department assigned to such facilities, and in regard to the duties performed by them, and for the government and discipline of each correctional facility. . . . " (App. 77, 78) The New York State Commissioner

is the official charged with the responsibility of making the rules and regulations governing the administration of all county jails, including the Schenectady County jail.

The institution of a "code of silence" and the enforcement of such a policy by harassment and threats clearly falls under the auspices of the Commissioner of Correction in his role as rulemaking official. The Sheriff cannot have final policymaking authority for a "code of silence" when it is clear that the Commissioner of Correction is vested with the authority to make the rules for the government of the jail.

2. The existence of a "code of silence" and the action allegedly taken by the Sheriff implicate the integrity of the Jail and the safety of the inmates; areas where the New York State Correction Commission has final policymaking authority.

Even if the Second Circuit is correct in asserting that the Sheriff is the final policymaker for employees' actions toward each other, the existence of a "code of silence" and the action taken by the Sheriff affect the integrity of the jail and the safety of the inmates. In this area, the Correction Commission is undeniably the final policymaking authority.

In order to achieve its goal of maintaining the integrity and safety of the jail, the Correction Commission has the power to "establish procedures to assure effective investigation of grievances, and conditions affecting, inmates of local correctional facilities." N.Y. Correction Law § 45(4). (App. 79-83) Indeed, the Sheriff testified that

he was obligated to, and did, notify the Correction Commission after the alleged April, 1994 incident. (Barnes 300-302)

The Correction Commission had the duty to investigate the allegations of inmate abuse to ensure the safety of the jail. A "code of silence" instituted by the Sheriff and actions taken in support of such would impede the Commission's ability to investigate. The Sheriff must answer to the Correction Commission if he encouraged a "code of silence" that subverted officer's duties to assist in this investigation.

The Second Circuit stated in its opinion that pursuant to New York Correction Law § 45(7) "if, in the judgment of the Correction Commission, there is 'an imminent danger to the health, safety or security of the inmates or employees of [a] correctional facility or of the public,' it may place a monitor in the facility." (App. 80) Thus, the sheriff must answer to the Correction Commission when a jail employee is put at risk.

If plaintiffs' allegations are true, plaintiffs were put at a substantial risk. The action allegedly taken, and implicitly encouraged, by the Sheriff was a factor in bringing about this risk. Thus, the Sheriff would have to answer to the Correction Commission and cannot be said to be the final policymaker.

The Second Circuit further stated that the Correction Commission "may also, if it believes necessary, establish a training program for jail personnel 'for the purpose of

providing for adequate care, custody, correction, treatment, supervision, discipline and other correctional programs for all persons confined in correctional facilities." (App. 18-20)

The Correction Commission is empowered with the ability to institute training programs for jail personnel. (App. 19) These programs ensure the integrity of the jail and safety of the inmates. Such areas are inextricably intertwined with the ability of corrections officers to report illegal behavior of other officers. The safety of the inmates is at risk if correction officers fear retribution for their disclosure of inmate abuse. Thus, in situations where, as here, the Sheriff's action put the safety of the inmates at risk, the Correction Commission has the ability to institute training programs for jail personnel to ensure the safety of the inmates.

Certainly, if the Correction Commission knew of the existence of such a policy, it would utilize its powers to monitor the situation, as well as institute training to eliminate such a policy. Thus, the Sheriff ultimately answers to the Correction Commission with respect to such a policy. When, as here, a County official is constrained by official policies and his actions are subject to review, he cannot be the final policymaker. *Brown v. Neumann, supra,* 188 F.3d 1289.

II. THE ACTION ALLEGEDLY TAKEN BY THE SHERIFF WAS ILLEGAL AND THUS CANNOT BE FAIRLY SAID TO REPRESENT OFFICIAL MUNICIPAL POLICY.

The Sheriff is not the final policymaker for the action complained of in the present case. However, even if it was true that the Sheriff could have final policymaking authority for a "code of silence", the Sheriff's action was illegal and cannot be fairly said to represent official municipal policy.

Under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), municipal liability is imposed only "where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Monell*, at 690-691. Further, the action taken must be such that it "may fairly be said to represent official policy." *Id.* at 694. The Second Circuit's decision expands the scope of municipal liability beyond what can "fairly be said to represent official policy" by imposing liability when the "final policymaker" has acted in direct contravention to established municipal policy and state law. In such a case, the "final policymakers" actions cannot be said to represent "official municipal policy." *Monell, supra*, at 690-691.

The Second Circuit concluded as a matter of law that the Sheriff is the "final policymaking official with respect to the conduct of his staff members toward fellow officers who exercised their first amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoings." (App. 24) Even if it is true that the Sheriff is the final policymaking official in this regard,

it cannot be said as a matter of law that the policy of a "code of silence" allegedly encouraged by the Sheriff represented the official "municipal policy" of Schenectady County.

1. The Sheriff is an Officer of the Court and action taken contra to his duties cannot represent official policy.

The Sheriff is an Officer of the court. He is required to uphold the law and behave as such. The action alleged taken by the Sheriff was a violation of New York Penal Law and his duties as an officer of the Court. Thus, it cannot represent official municipal policy.

Under New York law, the Sheriff is to "perform the duties prescribed by law as an officer of the court and conservator of the peace within the county." *See* N.Y. County Law § 650(1). (App. 72)

Plaintiffs' allegations fall outside the scope of any behavior that could reasonably be attributed to an "officer of the court and conservator of the peace". The institution and enforcement of a "code of silence" is not an area where any official county policy can exist. The Sheriff was not acting within the scope of the duties proscribed to him by law and thus, his action cannot represent municipal policy.

2. The Sheriff's action was illegal and cannot represent official policy.

A "code of silence" and actions taken to enforce such a policy constitute illegal acts. When the actions complained of are illegal they cannot represent official municipal policy.

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), involved actions taken by an assistant county prosecutor. The prosecutor ordered the local Sheriff to enter a clinic in violation of the Fourth Amendment. *Id.* The Court imposed liability upon the municipality because the county prosecutor was the final policymaker for such actions and, thus, his actions constituted official policy. *Id.* In concurrence, Justice White noted that the prosecutor's actions were not "illegal under federal, state or local law." *Id.* at 486. He further stated "if deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of respondeat superior and not because the officers' act represent local policy. Such results would not conform to Monell and the cases following it." *Id.* at 486.

The action allegedly taken by the Sheriff here, if true, is in violation of Section 195 of the New York State Penal Law, a class A misdemeanor. Section 195 states:

> "A public Servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:
>
> 1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

> 2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." New York State Penal Law § 193 (App. 84)

If plaintiffs' allegations are true, Sheriff Barnes was acting in violation of state law and his action cannot constitute official policy. Thus, a finding of municipal liability does not conform to either *Pembauer* or *Monell.*

The effect of the Second Circuit's decision is to find the County liable under a *respondeat superior* theory. This holding is not allowed under 42 U.S.C. § 1983 and *Monell.* The County cannot be liable in situations, such as here, where an individual is acting in a manner that cannot represent official policy. Further, the limited situations where a municipality can be liable for the action of an individual require that the individual be a final policymaker with respect to the action taken. The Sheriff is not a final policymaker for a "code of silence". Thus, a finding of municipal liability is based on *respondeat superior,* and is not allowed under *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

CONCLUSION

For all the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CHRISTOPHER JEFFES, JOHN E. KEENAN, JR., and JERRY CARLOS, Plaintiffs-Appellants, -v.- WILLIAM BARNES, Individually and as Sheriff of the County of Schenectady, HARRY BUFFARDI, Individually and as Undersheriff of the County of Schenectady, ROBERT ELWELL, SR., Individually and as an Employee of the County of Schenectady, JOHN DOES being unnamed Employees of the County of Schenectady, and THE COUNTY OF SCHENECTADY, Defendants-Appellees.

Docket No. 98-9369

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2000 U.S. App. LEXIS 5150

June 28, 1999, Argued

March 28, 2000, Decided

COUNSEL: KEVIN A. LUIBRAND, Albany, New York (Tobin & Dempf, Albany, New York, on the brief), for Plaintiffs-Appellants.

RICHARD M. GERSHON, Albany, New York (Thorn & Gershon, Albany, New York, on the brief), for Defendant-Appellee County of Schenectady.

JUDGES: Before: KEARSE, STRAUB, and POOLER, Circuit Judges.

OPINION BY: KEARSE

OPINION:

KEARSE, Circuit Judge:

Plaintiffs Christopher Jeffes et al. appeal from a partial final judgment entered pursuant to Fed.R.Civ.P. 54(b)

in the United States District Court for the Northern District of New York, Thomas J. McAvoy, Chief Judge, dismissing so much of their complaint, brought under 42 U.S.C. § 1983 (Supp. III 1997), as asserted First Amendment claims against defendants William Barnes, Harry Buffardi, and Robert Elwell, Sr. (collectively the "individual defendants"), in their official capacities, and defendant County of Schenectady (the "County" or "Schenectady County") for retaliating against plaintiffs for reporting to the public and to federal investigative authorities certain wrongdoing by County employees. The district court granted summary judgment dismissing these claims on the ground that plaintiffs failed to adduce evidence sufficient to permit an inference that their rights were violated as a result of a County policy or custom. On appeal, plaintiffs contend principally that, in so concluding, the district court failed to draw all permissible inferences in their favor, and that the court should have concluded that Barnes was the County's policymaker with respect to the actions complained of. For the reasons that follow, we agree, and we therefore vacate the judgment and remand for further proceedings on the claims against the County and against the individual defendants in their official capacities, along with the undismissed claims that are not the subject of this appeal.

I. BACKGROUND

The events at issue involved operations of the Schenectady County Jail ("Jail" or "County Jail"), which is run by the County's Sheriff's Department ("Department"). At the pertinent times, the individual defendants were

supervisors in the Department. Barnes was the sheriff; Buffardi, the undersheriff, was his second-in-command; Elwell was a major, responsible for the Jail's day-to-day operations.

All of the plaintiffs were employees of the Department, working in the County Jail. Jeffes was a correction officer for several years beginning in 1979; in or about 1984, he achieved the rank of lieutenant after passing a civil service examination; in 1991 Barnes appointed Jeffes a provisional major. Jeffes ceased to work at the Jail in late 1994. Plaintiff John R. Keenan, Jr., was a correction officer from 1982 until mid-1996. Plaintiff Jerry Carlos, a correction officer since 1981, remained so employed through the time this suit was begun.

In April 1994, there occurred an alleged incident of flagrant abuse of inmates at the Jail by certain correction officers. Jeffes publicly criticized the assaults; he, Keenan, and Carlos, among others, assisted in an investigation conducted by the Federal Bureau of Investigation ("FBI"). The present lawsuit arises out of a campaign of harassment, threats, and intimidation by members of the Department against plaintiffs in retaliation for their public disclosures and their assistance in the investigation. Construed in the light most favorable to plaintiffs, with all reasonable inferences drawn in their favor, the evidence as reflected in affidavits and dozens of depositions showed the following.

A. The April 29, 1994 Inmate Beatings and the Official Responses

At the County Jail on April 29, 1994, apparently in response to an incident the previous day in which Jail officers had been attacked by several inmates, a group of guards inflicted severe physical abuse on seven inmates at the Jail. The abuse occurred while the inmates were being transported one-by-one from a new jail building to a special housing unit in the old building. During the transfer, the inmates were dragged, thrown, kicked, punched, and otherwise beaten while naked, handcuffed, and shackled. Officer William Leguire, for example, allegedly threatened to kill one inmate and stood on his face.

According to some witnesses, some of the inmate abuse occurred in the presence of Jail supervisors, including Sheriff Barnes. One lieutenant, for example, saw officers throw an inmate into an elevator and then beat him as he lay in a fetal position; as this was occurring, Sheriff Barnes looked on, said that the officers should " 'act in a professional manner,' " and smiled. (Deposition of David Monroe at 29.)

Keenan and Carlos were among the witnesses to the beatings. When Carlos reported the incident he had seen to several superior officers, some of them responded there was nothing they could do and that Sheriff Barnes and Undersheriff Buffardi were aware of what had happened. When Carlos reported the incident directly to Sheriff Barnes, Barnes responded " 'Well, OJ, you know, sometimes it just has to be,' " or " 'You just have to do what you got to do.' " (Deposition of Jerry Carlos

("Carlos Dep.") at 37.) In a conversation with correction officer Christopher O'Connor some weeks later, Sheriff Barnes, with an air of pride, described the incident as " 'great.' " (Deposition of Christopher O'Connor ("O'Connor Dep.") at 52.)

Major Jeffes was not on duty on April 29, but he received reports of the incident thereafter from several officers. Although official Jail policy required Jeffes to relay the reports of inmate abuse to his superiors, Jeffes decided that any such report would be futile, since he had been informed that Sheriff Barnes and Undersheriff Buffardi had known of and encouraged the beatings. Jeffes warned certain officers that the beatings could have serious repercussions for the officers involved, that the FBI would likely investigate the matter, and that officers should not lie under oath about the incident.

In July 1994, the beaten inmates filed notices of claim against the County, implicating several Jail officials including Sheriff Barnes. In the fall of 1994, a television news program featured an investigative report on the April 29 incident (the "news report"). As part of that news report, Jeffes gave an on-camera interview, but with his voice and appearance disguised, describing the seriousness of the abuse and implicating Sheriff Barnes in the incident. Jeffes had insisted on anonymity because he believed that if he were identified as the speaker he would "be labeled a rat and a snitch." (Deposition of Christopher Jeffes ("Jeffes Dep.") at 110.)

In late 1994, a federal investigation into the April 29 incident was begun. Jeffes met with FBI agents and conveyed to them much of the information he had learned

regarding the inmate beatings. Keenan and Carlos too agreed to cooperate with the FBI, as did other officers, and all three plaintiffs testified in grand jury proceedings. The federal investigation led to various criminal charges, including an indictment against four officers. Keenan and Carlos, inter alios, testified at their trial, which was held in July 1996. Those four officers were eventually acquitted. A fifth officer pleaded guilty to a charge of use of excessive force.

B. The "Code of Silence" and the Retaliations

Major Elwell, at his deposition, testified that there is a "code of silence" at the Jail and that officers who report wrongdoing by fellow officers face severe ostracism. (Deposition of Robert D. Elwell ("Elwell Dep.") at 153-54.) Elwell testified, "I work within it ever [sic] day." (*Id.* 153.) He recalled another case in which an officer had breached the code of silence and had suffered such harsh ostracism that the officer either was or was nearly forced to resign. Correction officer Stanley Marchinkowski testified that in the wake of the April 29, 1994 inmate beatings, a representative of the Jail officers' labor union told several officers that " 'as far as any investigation goes, anyone who turns in an officer is a rat, a snitch,' " and that "everybody had to stick together." (Deposition of Stanley Marchinkowski at 53.) O'Connor testified that when Sheriff Barnes commented to him on the April 29 incident, describing it as " 'great,' " O'Connor expressed his disagreement, but Barnes stated that the officers needed to "stick[ ] together." (O'Connor Dep. at 52-53.)

After the federal investigation began, officers who were believed to have cooperated were subjected to numerous forms of harassment and intimidation by unidentified fellow officers. Plaintiffs and some half-dozen other targeted officers were, for example, incessantly depicted as "rats" and "snitches" on posters and in graffiti scrawled on walls in the Jail's hallways and bathrooms or on their lockers; they were subjected to name-calling in public areas and over walkie-talkies; they received harassing telephone calls; and they received outright threats of physical harm. The harassment of Keenan became unrelenting after he testified at the criminal trial of the four indicted officers. After Carlos testified at that trial, Sheriff Barnes himself, on at least two occasions, called Carlos " 'Rat' " and " 'Snitch,' " and told Carlos, " 'You're gonna get yours,' and 'We're gonna get [ ]ya.' " (Carlos Dep. at 58.)

The retaliation against Jeffes began in late 1994 immediately after the broadcast of the news report. Undersheriff Buffardi testified that the correction officers were very "angry" about the broadcast and that tensions among them were running high. (Deposition of Harry Buffardi at 61; *see* also Deposition of William Barnes ("Barnes Dep.") at 68 ("everybody was talking about it").). Buffardi had made a home videotape of the interview, and he and Barnes repeatedly reviewed the tape in the training room at the Jail. Both immediately suspected that Jeffes was the officer on the tape, and Barnes promptly took away Jeffes's administrative and supervisory responsibilities. When Jeffes inquired as to the reason, Barnes's only explanation was " '[p]eople do talk,

Chris, and you know what this is about.' " (Jeffes Dep. at 6.)

Sheriff Barnes and Undersheriff Buffardi also took steps to determine with greater certainty the identity of the officer on the news report. As instructed by Barnes, Buffardi went to an air force base in another county to have the videotape enhanced and analyzed using advanced military equipment. These efforts resulted in the preparation of an enhanced tape of the audio portion (the "audio tape") that made it apparent that the voice of the officer was that of Jeffes. Buffardi later also obtained from the air force a voice-print analysis confirming that Jeffes was the officer on the tape.

Sheriff Barnes and Undersheriff Buffardi invited other officers to watch Buffardi's videotape; Barnes and Buffardi also subsequently played for officers the audio tape that clarified that the speaker was Jeffes. The officers who were invited by Sheriff Barnes and Undersheriff Buffardi included Leguire and correction officer Andrew Jones, both of whom were alleged to have participated in the April 29 inmate abuse. Correction officer John D. Broderick testified that Leguire urged everyone to "go upstairs and view the tape to see who it really was." (Broderick Deposition at 59.)

Broderick testified that, at the time, he believed that Barnes's screening of the videotape of the news report and exposure of Jeffes as the interviewed officer were likely to so inflame other officers as to pose a serious threat to Jeffes's life. Jeffes testified that several officers expressed to him their concern that he was in danger of physical harm if he continued to work at the Jail.

In the wake of Sheriff Barnes's invitations to officers to view the enhanced videotape of Jeffes's interview, Jeffes was subjected to numerous threats and other acts of harassment and intimidation. He received up to 20 menacing telephone calls a day, during which he could hear background noises revealing that the calls were coming from the Jail. Jeffes was also subjected to various types of retaliation in addition to the acts described above. For example, Jeffes's radio communications were subjected to interference, so that each time he tried to use his walkie-talkie, "another officer would click on and thus 'step on' [his] communication," thereby placing Jeffes "in the position of not being able to call for help" and endangering his life. (Affidavit of Christopher Jeffes dated June 26, 1998 ("Jeffes Aff.") ¶ 7.) A poster was hung in the Jail depicting Jeffes with his eyes blacked out, and bearing the words "NOW MAYBE I CAN DIE." (*Id.* ¶ 4 & Ex. B.) Two unidentified men showed up at the back door of Jeffes's home and harassed his wife, intimating that Jeffes was likely to be injured because of his position at the Jail. Jeffes also experienced what he suspected were acts of vandalism at his home, exposing it to the risk of fire. By December 1994, Jeffes had become so anxious over the threats and harassment that he spent the nights on his living room couch, with a shotgun within arm's reach.

Jeffes began seeing a psychotherapist and ceased going to work. His subsequent application for disability benefits was denied, and his employment by the County was eventually terminated in August 1997. Keenan, also undergoing psychiatric care, left his post at the Jail in 1996 after a panic attack; he never returned. His application for disability benefits too was denied, and his

employment by the County was formally terminated in July 1997.

C. The Partial Judgment of the District Court

In 1997, plaintiffs commenced the present § 1983 action against the County and against Sheriff Barnes, Undersheriff Buffardi, and Major Elwell in their individual and official capacities, alleging that defendants had violated the First Amendment by retaliating against plaintiffs for speaking out against the inmate beatings and for cooperating with the federal government in its investigation. In seeking to impose liability on the County, plaintiffs contended that, as a matter of law, Barnes as County sheriff had final policymaking authority for the County with regard to Jail personnel and conditions, and that his instigation and command of the ongoing course of retaliation against plaintiffs was attributable to the County. They also argued that the retaliation against them was the result of Sheriff Barnes's deliberate indifference to their First Amendment rights, as reflected in, inter alia, his failure to supervise or train officers at the Jail in order to protect plaintiffs from an obvious threat of retaliation.

Following discovery, defendants moved for summary judgment dismissing the complaint. With respect to the claims asserted against them in their individual capacities, the individual defendants argued principally that there was no evidence that any of the named defendants was personally involved in the alleged harassment and intimidation. With respect to the claims asserted against the County and the individual defendants in their official

capacities (collectively the "claims against the County"), defendants contended that plaintiffs could not establish a First Amendment violation and that, in any event, under *Monell v. Department of Social Services*, 436 U.S. 658, 694, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the County could not be held liable because plaintiffs had not shown that any such violation was caused by a County policy or custom. Defendants argued that plaintiffs had not identified any formal policy that caused the alleged violations, that there was no evidence that Sheriff Barnes acted within his policymaking authority in directing subordinates to retaliate against plaintiffs, and that there was no evidence of a widespread or permanent custom of retaliation against correction officers who reported inmate abuse. The County further argued that the evidence did not show that the retaliation against plaintiffs was a result of the County's failure to train or supervise its correction officers.

In an opinion reported at 20 F.Supp.2d 404 (1998), the district court denied the individual defendants' motion to dismiss the claims asserted against them in their individual capacities, but granted the motion to dismiss the claims against the County, including those asserted against the individual defendants in their official capacities. With regard to individual liability, the court denied the motion to dismiss because the evidence showed sufficient personal involvement given the

> affirmative acts taken by Barnes to identify and disclose Jeffes as the disguised informer to his co-workers, and his failure to act after learning about the host of alleged retaliation and harassment that Jeffes, Keenan, and Carlos experienced after publicly reporting officer misconduct and

> cooperating in the federal investigation and subsequent prosecution.

20 F.Supp.2d at 416. The court went on to note that

> although the record is less clear as to the nature, if any, of any investigation undertaken by Barnes, a reasonable fact-finder could infer that there was little chance that Barnes would act in light of the allegations that he initiated much of the acts of retaliation and harassment complained of by the plaintiffs.

Id. at 417. The court thus concluded that there was

> a triable issue of fact regarding Barnes' supervisory liability based on his direct participation in the alleged constitutional violations, a deliberate indifference or tacit authorization to such acts, and a failure to remedy the acts of retaliation and harassment of which he became aware.

Id.

As to the claims against the County, however, the district court concluded that plaintiffs had not presented evidence that the alleged harassment should be attributable to the County. The court reasoned that the retaliatory actions taken against plaintiffs "occurred in the workplace and adversely affected the manner in which they carried out their assigned duties" and therefore "fit squarely within the context of employment or personnel matters," and it found that although Sheriff Barnes possessed some discretion in running the Jail, he did not "speak[ ] with final policymaking authority for Schenectady County in the area" of "municipal employment policy." *Id.* at 420, 421 (internal quotation marks omitted).

The court stated that the fact that "the Sheriff was effectively put on notice that such [retaliatory] events could occur at the jail . . . . fails to establish any awareness on the part of Schenectady County." *Id.* at 421-22.

The court found that there was not sufficient evidence to establish

> any widespread practice, express or otherwise, authorizing acts of retaliation and harassment in cases where employees exercise their First Amendment rights, that would establish a permanent or well settled custom or usage with equal force of law.

Id. at 419. The court also rejected plaintiffs' contention that the harassment was the result of the County's failure adequately to train or supervise other correction officers, given the lack of "any evidence that [the] County was aware that the alleged retaliatory conduct had occurred or that employees had historically mishandled similar situations." *Id.* at 421.

The court eventually entered a Rule 54(b) certification with respect to the claims against the County, and a partial final judgment dismissing those claims was entered. This appeal challenges that dismissal.

II. DISCUSSION

On appeal, plaintiffs contend principally that the district court (a) imposed on them an inappropriate burden to show as a matter of law that Sheriff Barnes possessed final policymaking authority in the area involved in this suit, and (b) failed to draw all permissible inferences in their favor. Although we reject plaintiffs' first contention,

we conclude that under state and local law, the sheriff of Schenectady County is the County's final policymaker with respect to most of the actions complained of here. And when all permissible factual inferences are drawn in favor of plaintiffs as the parties opposing summary judgment, *see* generally *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), there are genuine issues to be tried as to whether the injuries of which plaintiffs complain were caused by decisions of Sheriff Barnes as policymaker.

A. Municipal Liability Under § 1983

In a suit under 42 U.S.C. § 1983, a municipality may not be held liable on a theory of respondeat superior. *See*, e.g., *Monell v. Department of Social Services*, 436 U.S. at 694. It may, however, be held liable if the conduct that caused the unconstitutional deprivation was undertaken pursuant to

> a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers[,] . . . [or] pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690-91. The municipality cannot properly be held liable in such an action unless the "injury was inflicted by [its] 'lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " *St. Louis v. Praprotnik*, 485 U.S. 112, 121-22, 99 L. Ed. 2d 107, 108 S.

Ct. 915 (1988) (plurality opinion) (quoting *Monell*, 436 U.S. at 694).

Where the contention is not that the actions complained of were taken pursuant to a local policy that was formally adopted or ratified but rather that they were taken or caused by an official whose actions represent official policy, the court must determine whether that official had final policymaking authority in the particular area involved. *See*, e.g., *Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989); *Praprotnik*, 485 U.S. at 123-25 (plurality opinion). It does not suffice for these purposes that the official has been granted discretion in the performance of his duties. *See*, e.g., *id.* at 127. "Only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *Id.* at 123 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality opinion)).

Whether the official in question possessed final policymaking authority is a legal question, *see*, e.g., *Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 124 (plurality opinion), which is to be answered on the basis of state law, *see*, e.g., *McMillian v. Monroe County*, 520 U.S. 781, 786, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997) (proper "understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law"); *Jett*, 491 U.S. at 737, *Praprotnik*, 485 U.S. at 123 (plurality opinion). "The relevant legal materials, include state and local positive law, as well as custom or usage having the force of

law." *Jett*, 491 U.S. at 737 (internal quotation marks omitted). The matter of whether the official is a final policymaker under state law is "to be resolved by the trial judge before the case is submitted to the jury." *Id.* (emphasis in original).

Most important for this appeal, the official in question need not be a municipal policymaker for all purposes. Rather, with respect to the conduct challenged, he must be "responsible under state law for making policy in that area of the [municipality's] business." *Praprotnik*, 485 U.S. at 123 (emphasis added); *see*, e.g., *Jett*, 491 U.S. at 737 (must "have the power to make official policy on a particular issue ") (emphasis added); *Pembaur*, 475 U.S. at 481 (plurality opinion) (must "possess[ ] final authority to establish municipal policy with respect to the action ordered") (emphasis added). Thus, the court must "ask whether [the] governmental official[is a] final policymaker[ ] for the local government in a particular area, or on [the] particular issue" involved in the action. *McMillian*, 520 U.S. at 785.

In sum, the question of whether a given official is the municipality's final policymaking official in a given area is a matter of law to be decided by the court. Where a plaintiff relies not on a formally declared or ratified policy, but rather on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. We thus reject plaintiffs' contention that the district court erred in imposing that burden on them; and we turn to the question of whether, as to the particular area at issue here, the burden was met.

B. The Authority of the Schenectady County Sheriff

The County contends that, although the sheriff is its final policymaker with respect to matters of law enforcement, he has no final policymaking authority with respect to matters of "personnel." (County brief on appeal at 18-19.) In granting summary judgment in favor of the County, the district court agreed that the sheriff has no such authority with respect to "municipal employment policy." 20 F.Supp.2d at 421. The court found the present case to be similar to "Praprotnik [which] dealt with plaintiff's allegations that his First Amendment rights were violated through a retaliatory transfer" to a new position, 20 F.Supp.2d at 420. It noted that the *Praprotnik* Court had

> characterized the retaliatory actions as involving matters of "personnel administration" and "employment policy," [485 U.S.] at 128-29 . . . and found that the city officials were not authorized under the city charter to establish employment policy for the municipality, and were therefore merely exercising discretion rather than formulating municipal policy.

20 F.Supp.2d at 421.

We view the district court's analysis in terms of general "personnel" and "employment" matters as insufficient to identify the policymaker with respect to the "particular issue" involved here, *McMillian*, 520 U.S. at 785. The principal area in question in this suit involves the duties and obligations of the sheriff's staff members toward each other with respect to their exercise of First Amendment rights in breach of the Jail's code of silence. The following review of New York State ("State") law leads us to the conclusion that the Schenectady County

sheriff was the County's final policymaker with respect to most of the conduct that plaintiffs challenge.

Under New York law, the sheriff of Schenectady County, as in most of the State's counties, is an elected official. *See* N.Y. Const. art. XIII, § 13(a) (McKinney Supp.1999); N.Y. County Law § 400, subd. 1 (McKinney 1991). In addition to requiring the sheriff to "perform such additional and related duties as may be prescribed by law and directed by the board of supervisors or the county legislature," N.Y. County Law § 650, subd. 1 (McKinney 1991), State law specifies that, except in two counties not relevant here, "each sheriff . . . shall have custody of the county jails," N.Y. Correct. Law § 500-c (McKinney Supp.1999).

"In addition to the statutory powers and duties which a Sheriff now has[,] he also has those duties which were fixed at common law and which have not been abrogated by statute." *Isereau v. Stone*, 207 Misc. 941, 948, 140 N.Y.S.2d 585, 592 (N.Y. Sup. Ct. 1955), aff'd in part, rev'd in part on other grounds, 3 A.D.2d 243, 160 N.Y.S.2d 336 (4th Dep't 1957). "The powers, duties and obligations of a Sheriff" under common law, as under § 500-c of the Correction Law, include the "care and maintenance of the county jail and its inmates." *Id.* at 949, 140 N.Y.S.2d at 593-94 (internal quotation marks omitted).

Matters pertaining to inmate conditions at the local jails, such as inmate care, custody, discipline, health, safety, employment, and grievances, are subject to some supervision and control by officials and agencies of State, rather than county, government. *See* N.Y. Correct. Law § 45 (McKinney 1987). For example, the State Commission

of Correction ("Correction Commission") has the power and the duty to, inter alia,

> [v]isit, inspect and appraise the management of correctional facilities with specific attention to matters such as safety, security, health of inmates, sanitary conditions, rehabilitative programs, disturbance and fire prevention and control preparedness, and adherence to laws and regulations governing the rights of inmates.

Id. § 45, subd. 3. The Correction Commission is required to "[p]romulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities." *Id.* subd. 6. If, in the judgment of the Correction Commission, there is "an imminent danger to the health, safety or security of the inmates or employees of [a] correctional facility or of the public," it may place a monitor in the facility. *Id.* subd. 7. The Correction Commission may also, if it believes necessary, establish a training program for jail personnel "for the purpose of providing for adequate care, custody, correction, treatment, supervision, discipline and other correctional programs for all persons confined in correctional facilities." *Id.* subd. 9; *see* also *id.* subd. 9-a (for the same purposes, Correction Commission is to "promulgate rules and regulations for the certification of part-time local correctional officers employed by local correctional facilities who have satisfactorily completed an in-service correctional training program sponsored by the local correctional facility"). However, nothing in these provisions, informs or circumscribes the sheriff's authority with respect to the

duties and obligations of his staff members toward each other.

With regard to the sheriff's authority over his staff, New York law provides that "the sheriff may . . . appoint keepers, guards, clerks and employees as may be authorized by the board of supervisors and such appointees shall serve during his pleasure." N.Y. County Law § 652, subd. 2 (McKinney Supp.1999). This power of appointment and termination is somewhat circumscribed by the current version of the New York Constitution, which has the effect of placing a sheriff's appointees under the civil service system. Prior to 1990, the State Constitution provided that "the county shall never be made responsible for the acts of [its] sheriff." N.Y. Const. art. XIII, § 13(a) (McKinney 1987), amended by N.Y. Const. art. XIII, § 13(a) (McKinney Supp.1999). As a result of that provision, a sheriff's appointees were considered to be employees of the sheriff himself, rather than of the city or county in which he operated, *see*, e.g., *Enstrom v. City of New York*, 258 A.D. 672, 676, 17 N.Y.S.2d 964, 968 (2d Dep't 1940); *Reck v. County of Onondaga*, 51 Misc.2d 259, 261, 273 N.Y.S.2d 146, 150 (N.Y. Sup. Ct. 1966), and most were regarded as beyond the scope of the civil service system, *see*, e.g., *Flaherty v. Milliken*, 193 N.Y. 564, 86 N.E. 558 (1908), superseded by N.Y. Const. art. XIII, § 13(a) (McKinney Supp. 1999); *Grifenhagen v. Ordway*, 218 N.Y. 451, 113 N.E. 516 (1916), superseded by N.Y. Const. art. XIII, § 13(a) (McKinney Supp.1999). After the State Constitution was amended in 1990 to delete the provision relieving counties of liability for the acts of their sheriffs, *see* N.Y. Const. art. XIII, § 13(a) (McKinney Supp.1999), the amendment was interpreted by the State legislature

and the State courts to mean that all sheriffs' employees are to be included in the civil service system. *See*, e.g., N.Y. Civ. Serv. Law § 59, subd. 1 (legislative finding that the 1990 amendment to the New York State constitution "brings appointees of a county sheriff into the classified service of the civil service"); *Thoubboron v. New York State Department of Civil Service*, 79 N.Y.2d 982, 584 N.Y.S.2d 433, 594 N.E.2d 927 (1992), aff'g 175 A.D.2d 443, 572 N.Y.S.2d 494 (3d Dep't 1991).

According to Schenectady County Manager Robert D. McEvoy, the functions of the County's Civil Service Commission with respect to appointments by the sheriff consist of "what Civil Service Commissions normally do." (Deposition of Robert D. McEvoy ("McEvoy Dep.") at 19.). Referring to the person who was personnel administrator for the County, McEvoy testified as follows:

> He's the staff to the Civil Service Commission as they do testing, as they do job descriptions, job placements, job categories, whether they're examined or competitive, non-competitive, that's what Civil Service Commissions normally do, he directs the staff; then his role as Personnel Director, he does recruiting, he does labor contract negotiations, he does all the matters that go along with the labor contract administration, he also runs the welfare, the work programs that we have, because we have all that merged together in one unit, he supervises that because that's employment, we have all employment activity in one place.

(*Id.*) None of these areas within the normal scope of civil service supervision has any bearing on the existence of a code of silence at a correctional facility or the custom of

enforcing that code by harassing and intimidating jail staff members who exercise their rights under the First Amendment to reveal wrongdoing by fellow workers.

Nor does local County law provide any indication that there is any final policymaker other than the Schenectady County sheriff with respect to operations at the Jail. The Schenectady County Manager is the municipality's chief executive official, chosen by the County legislature. *See Charter of County of Schenectady* § 3.00. The County Manager "appoints" and "exercises supervision and control" over "the heads of all departments . . . except such officers required to be elected and their subordinates." *Id.* § 3.01, subd. 2-3 (emphasis added). Since under State law the sheriff is required to be elected, he and his subordinates, as a matter of law, are not controlled or supervised by the Schenectady County Manager.

Nor is the sheriff, or his management of his subordinates, controlled or supervised by the County Manager in practice. In his deposition in this case, County Manager McEvoy, far from suggesting that the County supervised the sheriff in the operation of the Jail, testified that the County Manager's office would meet with the sheriff's staff only as desired by the sheriff and would never give any substantive direction. "We are a service organization to the jail and our people meet with him or his agents because we are just servicing. . . . Since it's strictly a service function, there is no need for me to meet with him, unless he wanted to. . . . " (McEvoy Dep. at 20.) The County Manager stated that he would "never, never" have "substantive conversations" with Sheriff Barnes

about the sheriff's work because the sheriff is a "constitutional officer." (*Id.* at 21.) Citing the advice he had received "many times" from the County's attorneys with respect to the sheriff (*id.* at 21-22), the County Manager testified, "I have nothing to do with his work responsibility, he's autonomous. . . . He runs the jail on his own. . . . " (*Id.* at 21.) Although the County argues that McEvoy was referring only to the sheriff's law enforcement function (*see*, e.g., County brief on appeal at 18), that argument is belied by the testimony itself. With respect to the sheriff and "jail operations," McEvoy stated succinctly, "he's in charge and has the authority for the jail, which we do not. . . . " (*Id.* at 15.)

In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County's chief executive officer; there is only routine civil service supervision over the sheriff's appointments; State law places the sheriff in charge of the Jail; and the County's chief executive officer, advised by the County's attorneys, treats the sheriff, insofar as Jail operations are concerned, as "autonomous."

We could agree with the view that the sheriff is not the final policymaker for purposes of § 1983 analysis if the complaint were simply that plaintiffs had been subjected to unwarranted formal discipline or changes in job assignments. But their claims go far beyond these routine classes of personnel actions within the domain of a civil service commission. The bulk of plaintiffs' claims center on harassment, intimidation, threats, and endangerment of their lives. The County has pointed us to no provision of State or local law that requires a sheriff to answer to

any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law, the County's final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoing.

C. Summary Judgment on the Issue of Causation

The issue of whether the relevant conduct of the pertinent policymaking official caused the injury of which the plaintiff complains is a question of fact for the jury:

> Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, *see Monell*, 436 U.S. at 661, n. 2, or by acquiescence in a long-standing practice or custom which constitutes the "standard operating procedure" of the local governmental entity.

Jett, 491 U.S. at 737 (emphasis omitted). A plaintiff may prove the causation element by showing either that the official who is a final policymaker in the area directly committed or commanded the violation of the plaintiff's federal rights, *see id.*, or that while the policymaker himself engaged in "facially lawful . . . action," he indirectly caused the misconduct of a subordinate municipal employee, *Board of the County Commissioners v. Brown*, 520

U.S. 397, 405-07, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). Because respondeat superior liability is not permissible, however, the courts must apply "rigorous standards of culpability and causation . . . to ensure that" the indirect-causation theory not result in the municipality's being "held liable solely for the actions of its employee." *Id.* at 405; *see, e.g., City of Canton v. Harris*, 489 U.S. 378, 388-92, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989).

With that caveat, it is well established that a municipal policymaker may be found to have caused subordinate officials' conduct by reason of the policymaker's "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Jett*, 491 U.S. at 737. Thus, "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Brown*, 520 U.S. at 404; *see* also *Sorlucco v. New York City Police Department*, 971 F.2d 864, 871 (2d Cir. 1992) (municipality may be held liable where the unconstitutional conduct of subordinate employees is "so manifest as to imply the constructive acquiescence of senior policy-making officials").

Further, municipal liability may be premised on the municipality's failure to train its employees "where that . . . failure to train reflects deliberate indifference to . . . constitutional rights." *City of Canton v. Harris*, 489 U.S. at 392. Proof of deliberate indifference is a sine qua non for the imposition of liability on this basis. *See id.* at 389 ("Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate

indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."). The Harris Court explained that

> [i]t may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390 (footnote omitted). *See* also *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995) ("To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious."); *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991) (deliberate indifference may be shown by "evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges" that its employees were violating citizens' constitutional rights).

In the present case, the evidence adduced by plaintiffs sufficed to present several triable issues as to the existence of a municipal policy causing retaliation against plaintiffs for the exercise of their First Amendment rights

to speak of the April 29, 1994 incident of inmate abuse. The reprisals included numerous menacing telephone calls from the Jail; a poster depicting Jeffes with his eyes blacked out, and bearing the words "NOW MAYBE I CAN DIE" (Jeffes Aff. ¶ 4 & Ex. B.); explicit threats of physical harm; a visit to Jeffes's home by unidentified men who told his wife that his Jail-connected acts were likely to cause Jeffes to be injured; acts that exposed Jeffes's home to the risk of destruction by fire; and the endangerment of Jeffes's life when harassing officers interfered with his attempts to communicate by walkie-talkie from the Jail's cell blocks. These acts were overtly critical of plaintiffs' breaches of the Jail's code of silence, and there was evidence from which the jury could infer that that code constituted Sheriff Barnes's standard operating procedure. Major Elwell, who was responsible for the Jail's day-to-day operations, testified that the code of silence existed and that he "worked within it ever [sic] day." (Elwell Dep. at 153.) As a general matter under that code, officers were not to disclose wrongdoing by other officers. In the wake of the April 1994 inmate-abuse incident, Barnes himself told correction officer O'Connor that the officers should "stick[ ] together." (O'Connor Dep. at 52-53.) After Carlos testified at the trial of the four officers indicted in connection with that incident, Barnes called him a " 'rat' " and a " 'snitch' " and promised retribution. (Carlos Dep. at 58.) Given Barnes's autonomy with respect to Jail operations, Elwell's testimony as to the constant adherence to the code of silence, and the other evidence that Barnes himself embraced and enforced that code, a jury could permissibly find that the

code of silence was a practice or custom that constituted the municipality's standard operating procedure.

Further, there was ample evidence to permit a rational juror to find that Sheriff Barnes directly encouraged the acts of retaliation against plaintiffs for exercise of their First Amendment rights. After Carlos testified at the trial of the indicted officers, Barnes told him, " 'You're gonna get yours,' and 'We're gonna get [ ]ya' " (Carlos Dep. at 58). After viewing the videotape of the anonymous officer who spoke out about the inmate-abuse incident and suspecting that the officer was Jeffes, Barnes had promptly sought scientific confirmation of his suspicion and had invited other correction officers – including at least two who were officers alleged to have participated in the inmate abuse – to hear the enhancement clarifying that the officer who spoke out was Jeffes. The harassment, intimidation, and endangerment of Jeffes occurred largely in the wake of Barnes's confirmation and communication that the officer speaking out was Jeffes. The jury would be entitled to infer that Barnes's conduct was a direct cause of the harassment of plaintiffs.

Sheriff Barnes offered a contrary view as to his reason for seeking confirmation that the interviewed officer was Jeffes. He testified that he had sought to determine the officer's identity only because no one had ever told him there was any inmate abuse on April 29, 1994. (*See*, e.g., Barnes Dep. at 67 ("nobody had ever filed a report"); *id.* at 70 ("I wanted to know because nobody had ever reported it, okay?").) The jury could credit this explanation. Or it could instead believe other evidence, such as the testimony of Carlos that he personally reported the incident to Barnes; or the testimony of correction officer

O'Connor that he had discussed the abuse with Barnes and that Barnes characterized the guards' actions as " 'great' "; or the testimony of Lieutenant Monroe that at least one of the abusive incidents was actually observed by Sheriff Barnes, and indeed, observed with a smile. Crediting the testimony of these officers, as well as other evidence, the jury would be entitled to infer that Barnes's action in inviting some or all of the accused officers to hear the enhanced tape confirming that the accusing officer was Jeffes was designed to and did directly lead to the harassment of Jeffes.

There is perhaps less evidence that Barnes directly contributed to the harassment of Keenan. Nonetheless, a jury could permissibly find that the harassment, intimidation, and endangerment of all of the plaintiffs was at least indirectly caused by Barnes, both through his acquiescence in that misconduct and through his deliberate indifference to the need to train his staff not to retaliate against a fellow worker for exercising his First Amendment rights and assisting governmental investigation of alleged wrongdoing.

Barnes's acquiescence in the harassment of plaintiffs for exercising their First Amendment rights could be inferred from the evidence discussed above as to the existence of the code of silence, adherence to which was a routine factor in the Jail's operation, and as to Barnes's insistence on adherence to that code. Also supporting the inference of acquiescence was the evidence that the harassment of plaintiffs and other officers who had spoken out or cooperated in the federal investigation was widespread and conspicuous. That evidence included deposition testimony that some form of harassment or

intimidation was visited upon at least nine officers; that the harassment at the Jail occurred on "a daily basis"; that the visual depictions of officers as rats were posted "everywhere and anywhere" around the Jail; that the insults and rat noises over the radio continued for years; and that complaints of the harassment were made to Barnes and other supervisors.

Further, given the evidence that the harassing and intimidating misconduct was open and notorious and was avowedly retaliatory against officers for exercising their First Amendment rights and assisting governmental investigation into alleged wrongdoing, the jury could infer that Barnes had deliberately not trained his staff to avoid infringing those rights notwithstanding that the need for such training was obvious. In further support of that inference, there was evidence from Barnes himself that in the past, when the concern was not the code of silence, he had taken prompt action to put an end to harassment and disparagement. He testified that in 1992, he had sent his staff members two communications disapproving of disparaging and demeaning writings posted or scrawled on the walls. One instance involved writings depicting part-time employees as "scabs"; the other involved commentary on sexual orientation. In those instances, Barnes ordered that the posters be removed and that the walls bearing writing be scrubbed or painted; he sent memoranda dated September 15, 1992, and October 29, 1992, stating that such acts would not be tolerated. But between October 29, 1992, and mid-1996, which included most of the period in which these plaintiffs and at least six other officers were harassed, intimidated, and threatened with bodily harm for breaching the

code of silence, Barnes took no steps to halt those acts and sent no memoranda regarding proper conduct (*see*, e.g., Barnes Dep. at 19).

In sum, a jury could permissibly find that the code of silence was part of Barnes's standard operating procedure at the Jail and that his affirmative actions were a direct cause of the violations of plaintiffs' First Amendment rights. In light of the scope, duration, openness, and pervasiveness of the retaliation against officers who broke the code of silence, the jury could find that Barnes was well aware of the existence and thrust of those acts of retaliation. Based on his failure to make any effort to forestall, halt, or redress the retaliatory conduct, the jury could well find that, even if Barnes did not directly cause the retaliation, he either acquiesced in it or was deliberately indifferent to the reprisals against officers who exercised their First Amendment rights in breach of the code of silence.

Given our conclusion as a matter of law that Barnes was the County's final policymaker with respect to the conduct of his staff members toward one another in this area, any of these findings would suffice for the imposition of liability on the County.

CONCLUSION

We have considered all of the County's contentions in support of summary judgment in its favor and have found them to be without merit. The Rule 54(b) judgment of the district court is vacated, and the matter is remanded for further proceedings not inconsistent with

this opinion. We express no view on the overall merit of plaintiffs' claims.

Costs of this appeal are awarded to plaintiffs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHRISTOPHER JEFFES, JOHN E. KEENAN, JR. and JERRY CARLOS,
Plaintiffs,

-vs-

97-CV-0214
(Filed Sep. 16, 1998)

WILLIAN BARNES, Individually and as Sheriff of the County of SCHENECTADY; HARRY BUFFARDI, Individually and as UNDERSHERIFF OF THE COUNTY OF SCHENECTADY; ROBERT ELWELL, SR., Individually and as an Employee of THE COUNTY OF SCHENECTADY; "JOHN DOES" being unnamed Employees of THE COUNTY OF SCHENECTADY; and THE COUNTY OF SCHENECTADY,

Defendants.

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For Defendant County of Schenectady

MEMORANDUM-DECISION & ORDER

McAVOY, CHIEF JUDGE:

This action arises out of events surrounding the movement of inmates at the Schenectady County Jail ("County Jail") in April 1994 in which a number of inmates alleged that they were severely beaten by corrections officers while being transported between jails. Subsequently, the inmates brought suit against the defendants named in this action and other employees of Schenectady County. A federal criminal investigation also commenced, and a multi-count federal indictment was brought against four corrections officers.

Plaintiffs Christopher Jeffes ("Jeffes"), John E. Keenan ("Keenan"), and Jerry Carlos ("Carlos"), present and former employees of the Schenectady County Sheriff's Department (the "Department"), bring this action under 42 U.S.C. § 1983, alleging that the defendants, the County of Schenectady ("Schenectady County"), William Barnes ("Barnes"), Harry Buffardi ("Buffardi"), Robert

Elwell, Sr. ("Elwell"), and unnamed employees of Schenectady County, violated the plaintiffs' First Amendment rights by fostering, encouraging, and permitting a campaign of retaliation and harassment against them for reporting the misconduct of their co-workers in connection with the alleged beating incident.

Defendants Schenectady County, Barnes, Buffardi, and Elwell now move for summary judgement.

I. Background

Plaintiff Jeffes was hired by the Department as a Correction Officer in 1979. Jeffes was employed continually by the Department from 1979, until December 8, 1994, the time he left. Pl. Rule 7.1(f) Stat. at ¶¶ 1, 16. During that time, Jeffes was promoted to Lieutenant and appointed provisional major by defendant Barnes. Jeffes Dep. at 27, 45-53. During his employment at the Department, Jeffes was not the subject of any disciplinary action, Jeffes Aff. ¶ 2, and no complaints were filed against him in the recent years prior to his departure. Barnes Dep. at 91, 101, 104-05, 112. Jeffes alleges that he was unable to continue to work at the jail and feared for his life due to acts of retaliation and harassment following his reporting of alleged officer misconduct at the jail. In August 1997, after failing to return to work pursuant to written notice, Jeffes was served with a Notice of Disciplinary Action stating that he was terminated effective August 31, 1997. Def. Schenectady County Rule 7.1(f) Stat. at ¶ 9.

Plaintiff Keenan was hired by the Department as a Correction Officer in 1982. After a provisional lay-off, he

was rehired and subsequently appointed as a Booking Officer, the position he retained until he left the Department on July 23, 1996. Keenan Dep. at 11-13. Keenan was not the subject of any complaints in the recent years preceding his leaving the Department, and had in fact received numerous commendations during this time. Barnes Dep. at 172-74, 175-77. Keenan alleges that he was unable to continue to work at the jail and feared for his life due to acts of retaliation and harassment following his cooperation with federal authorities investigating alleged officer misconduct at the jail. In July 1997, after failing to return to work pursuant to written notice, Keenan was served with a Notice of Disciplinary Action stating that he was terminated effective July 7, 1997. Def. Schenectady County Rule 7.1(f) Stat. at ¶ 23.

Plaintiff Carlos was hired by the Department as a Correction Officer in 1981. He is currently employed in that same position. Carlos Dep. at 7, 59.

On April 29, 1994, an incident allegedly occurred at the County Jail during the movement of a group of inmates from one section of the jail to another. These events later became the subject of an investigation by the U.S. Department of Justice concerning allegations that inmates were beaten by corrections officers during the transfer. Although Keenan and Carlos were on duty at the County Jail when the transfer occurred, Jeffes was not. Keenan Dep. at 20-22; Carlos Dep. at 18-20; Jeffes Dep. at 79. Keenan and Carlos later testified to activity surrounding the transfer of the inmates that they witnessed while present in the booking area. Keenan Dep. at 21-23, 28-30; Carlos Dep. at 35-37. Keenan and Carlos both testified at Grand Jury proceedings and a federal criminal trial in

connection with activities surrounding the transfer. Def. Schenectady County Rule 7.1(f) Stat. ¶¶ 25, 26, 29, 30. Jeffes only testified at the Grand Jury proceedings. Def. Schenectady County Rule 7.1(f) Stat. ¶ 5,6. Around early November, 1994, Jeffes appeared on television, with his voice and physical appearance disguised, making public statements concerning the alleged use of excessive force by correction officers upon inmates at the County Jail on April 29, 1994. Def. Schenectady County Rule 7.1(f) Stat. at ¶ 3; Pl. Rule 7.1(f) Stat. at ¶¶ 2-4. Following this broadcast, Jeffes alleges that he was subjected to continued retaliation and harassment by his co-workers. Pl. Rule 7.1(f) Stat. at ¶¶ 9, 10. Keenan and Carlos similarly allege retaliation and harassment resulting from their cooperation with the Department of Justice investigation.[1] Pl. Rule 7.1(f) Stat. at ¶¶ 19-24; Keenan Dep. at 40-44; Carlos Dep. at 45-54; 57-61. Plaintiffs do not identify Barnes, Buffardi, or Elwell as directly engaging in any acts of retaliation themselves. Jeffes Dep. at 128-30; Keenan Dep. at 41, 61; Carlos Dep. at 12-16. Rather, plaintiffs seek to hold Barnes, Buffardi, and Elwell liable for their personal involvement under the doctrine of supervisory liability, claiming that they encouraged, authorized, approved, and acquiesced in the unconstitutional conduct of their subordinate employees. Pl. Compl. at ¶¶ 37-39, 40-45. Plaintiffs also seek to hold defendant Schenectady County liable for the alleged retaliation and

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[1] The Justice Department investigation led to a federal criminal prosecution for civil rights violations, naming four correction officers in the April 29, 1994 incident. All of those defendants were acquitted on all counts. Def. Barnes et al. Rule 7.1(f) Stat. at ¶ 12.

harassment by its employees under *Monell* and its progeny.

II. DISCUSSION

A. Summary Judgment

The Court will now address defendants' motions for summary judgment.

1. The Standard for Summary Judgment

The standard for summary judgment is well-settled. Under Fed.R.Civ.P. 56(c), if there is "no genuine issue as to any material fact . . . the moving party is entitled to a judgment as a matter of law . . . where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see also Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 86 (1996). The moving party bears the initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED. R. CIV. P. 56(c)). The initial burden is to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Once the moving party has met its burden, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *See Celotex*

Corp., 477 U.S. at 322; *Matsushita*, 475 U.S. at 585-86. A dispute regarding a material fact is genuine if a reasonable jury could return a verdict for the non-moving party; that is, whether the non-movant's case, if proved at trial, would be sufficient to survive a motion for judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). When reasonable minds, however, could not differ as to the import of the evidence, then summary judgment is proper. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

Although the trial court must resolve all ambiguities and draw all inferences in favor of that party against whom summary judgment is sought, *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985) *cert. denied*, 484 U.S. 918 (1987), the motion will not be defeated by a non-movant who raises merely a "metaphysical doubt" concerning the facts or who only offers conjecture or surmise. *Delaware & H.R. Co. v. Conrail*, 902 F.2d 174, 178 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991) (quoting *Matsushita*, 475 U.S. at 586); *see also Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990). Indeed, the nonmoving party's opposition may not rest on mere allegations or denials of the moving party's pleading, but "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

The Court is mindful that in cases where the employer's state of mind or motives are at issue, records of the employer will rarely document such factors, and as such, the materials before the district court in a summary

judgment motion "must be carefully scrutinized" for circumstantial evidence about the employer's state of mind and those factors that motivated the challenged course of action. *See Chertkova*, 92 F.3d at 87; *Chambers v. TRM Copy Cntrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Where such subjective issues are "squarely implicated," a multitude of factual inferences may arise where "reasonable persons may differ in their resolution." *Patrick v. LeFevre*, 745 F.2d 153, 159 (1984).

It is with these considerations in mind that the Court addresses defendants' motions for summary judgment.

2. Liability Under § 1983

Defendants Barnes, Buffardi, and Elwell move for summary judgment dismissing plaintiffs' § 1983 claim against each defendant in both their individual and official capacities. Defendant Schenectady County also moves for summary judgment. Because official-capacity claims involve issues of municipal liability, the distinction between personal-capacity and official-capacity suits is critical in analyzing the liability and defenses of the defendants.

The Supreme Court, in *Kentucky v. Graham*, 473 U.S. 159 (1985), explained the relevant differences between the two types of claims:

> Personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long

> as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.

Id. at 165-66 (emphasis in original) (internal citations omitted) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Because official-capacity claims are equivalent to claims against the entity, a plaintiff must establish that "the entity's policy or custom played a role in the violation of federal law." *Hafer v. Melo*, 502 U.S. 21, 24-25 (1991) (quoting *Graham*, 473 U.S. at 166). This necessarily requires a *Monell*-type analysis sufficient to predicate liability for the governmental entity. For the same reasons, individuals sued in their official capacity are entitled only to those immunities and defenses that the governmental entity itself possesses. *See id.* at 25.

In contrast, personal-capacity suits "seek to impose individual liability upon a government officer for actions taken under color of state law." *Id.* Thus, in establishing personal liability in a § 1983 claim, a plaintiff need only show that "the [government] official, acting under color of state law, caused the deprivation of a federal right." *Id.* (citing *Graham*, 473 U.S. at 166). Accordingly, a plaintiff need not show a connection to a governmental policy or custom that is required under *Monell* and its progeny. When such government officials are sued in their personal capacities, "they may assert personal immunity defenses such as objectively reasonable reliance on existing law." *Id.*

Based upon this distinction, district courts have dismissed official-capacity claims against individuals as redundant or unnecessary where *Monell* claims were also asserted against the entity. *See, e.g., Union R.R. v. Village of S. Barrington*, 958 F. Supp. 1285 (N.D. Ill. 1997); *Vance v. Santa Clara*, 928 F. Supp. 993 (N.D. Cal. 1996); *Doe v. Rains Indep. Sch. Dist.*, 865 F. Supp. 375, 378 (E.D. Tex. 1994), *rev'd on other grounds*, 66 F.3d 1402 (5th Cir. 1995); *Doe v. Douglas County Sch. Dist.*, 775 F. Supp. 1414, 1416 (D. Colo. 1991). In this case, because plaintiffs bring both official-capacity claims against the individual defendants and a *Monell*-type claim against Schenectady County, the Court dismisses plaintiffs' official-capacity claims against Barnes, Buffardi, and Elwell.

The Court now addresses defendants' motions insofar as they attack plaintiffs' personal-capacity § 1983 claims.

B. First Amendment Claim

To prevail on a First Amendment retaliation claim under section 1983, plaintiffs must establish that "(1) their 'conduct is deserving of First Amendment protection' and (2) the defendants' conduct 'was motivated by or substantially caused by plaintiffs' exercise of free speech.' " *Hankard v. Town of Avon*, 126 F.3d 418, 421-22 (2d Cir. 1997) (citations omitted); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Bernheim v. Litt*, 79 F.3d 318, 324 (2d Cir. 1996). Recognizing that a public employee's right to freedom of speech is not absolute, courts have employed an additional balancing test when disputes arise involving First Amendment

rights of public employees. *See Bernheim*, 79 F.3d at 324. Here, the court must determine whether the employee's interests in commenting on matters of public concern outweigh the government's interest in maintaining effective and efficient public services for its citizens. *See id.*; *see also Connick v. Myers*, 461 U.S. 138, 142 (1983) (citing *Pickering v. Bd. Of Educ.*, 391 U.S. 563 (1968)). The Court analyzes the plaintiffs' personal-capacity claims in light of these well-settled standards.

Our initial inquiry requires an examination of the plaintiffs' speech to determine whether it is deserving of First Amendment protection. Courts have made clear distinctions regarding the type of speech and conduct that merit such protection. At one end of the spectrum, the First Amendment affords no protection to employee speech and conduct that qualifies as insubordination or " 'that impedes an employee's performance of his duties or that interferes with the proper functioning of the workplace.' " *Hankard*, 126 F.3d at 422 (quoting *Domiano v. Village of River Grove*, 904 F.2d 1142, 1145 (7th Cir. 1990)). In such instances, an employee cannot claim First Amendment protection nor federal court review, for matters involving lawful tasks within the scope of the employee's duties or matters concerning internal office affairs that do not give rise to matters of public concern. *See Connick*, 461 U.S. at 146-47 (internal questionnaire distributed by assistant district attorney criticizing decisions of her supervisors); *Hankard*, 126 F.3d at 423 (requirement that review board take further action pursuant to local police general order prior to submitting its final report was lawful and within scope of board's duties).

At the other end is employee speech on matters of legitimate public concern, which is entitled to First Amendment protection. *See Connick*, 461 U.S. at 140 ("[T]he Supreme Court has frequently affirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citations omitted); *Bernheim*, 79 F.3d at 325 ("These are issues of serious interest to the community . . . [that employees] should be able to speak freely about . . . without fear of retaliation.")

In the present case, plaintiffs allege that their supervisors and co-workers retaliated against them for publicly disclosing the misconduct of their co-workers and cooperating in the federal criminal investigation and subsequent prosecution. One would be hard-pressed to find a clearer example of speech that is more appropriately classified as a matter involving public concern and deserving of First Amendment protection. *Accord Mt. Healthy City Sch. Dist. Bd. Of Educ.*, 429 U.S. at 282 (disclosure of school dress code on local radio station); *Perry v. Sindermann*, 408 U.S. 593 (1972) (testimony before state legislature regarding college status); *Bernheim*, 79 F.3d at 325 (statements regarding quality of education provided by public school). Notably, defendant Schenectady County concedes this point. Schenectady County Mem. of Law at 5. Plaintiffs could conceivably have been compelled to disclose such events to the federal authorities and Grand Jury investigating the alleged inmate abuse. Because the plaintiffs have engaged in conduct that implicates First Amendment protection, the Court must now consider whether the defendants' alleged conduct was motivated or substantially caused by plaintiffs' speech.

The starting point for this analysis is plaintiff Jeffes television interview describing the alleged abuses occasioned during the inmate transfer. A tape of the interview, discussing allegations concerning jail operations and recent activities, was made by defendant Buffardi. Soon thereafter, Buffardi delivered the tape to defendant Barnes at the County Jail where they both viewed the tape in a training office located in the administrative area of the jail. Buffardi Dep. at 31-34. Not surprisingly, correction officers were angered over the negative publicity generated by the tape. Buffardi Dep. at 61. There was considerable conversation surrounding the contents of the broadcast, and speculation grew among the officers that Jeffes was the disguised individual that reported the allegations of inmate abuse at the County Jail. Elwell Dep. at 112-14; Barnes Dep. at 68. Although Barnes, Buffardi, and Elwell initially believed that Jeffes might be the anonymous informer on the tape, Elwell Dep. at 117; Buffardi Dep. at 41, substantial efforts were undertaken by Barnes and Buffardi to confirm their suspicions. Once Jeffes' identity was confirmed, many of Jeffes' coworkers, some of whom were the target of the federal investigation, were invited to view the tape with Barnes and Buffardi. In response to Jeffes reporting the alleged misconduct at the jail, Barnes reduced much of Jeffes' responsibilities as a lieutenant, while maintaining his title and salary level. Jeffes Dep. at 6, 132.

After first attempting to identify the disguised officer by using the services of a local television station, Buffardi Dep. at 36, 40, Barnes ordered Buffardi to have the tape analyzed at Griffiss Air Force Base, where more advanced technology was available to enhance the videotape and

identify the disguised officer. Buffardi Dep. at 63-66. When initial efforts failed to identify Jeffes as the disguised officer, Buffardi obtained a copy of another tape with Jeffes' voice, recorded some years earlier, to match against the interview tape. Buffardi Dep. at 70-72; Pollard Dep. at 54. A voice print analysis confirming Jeffes as the disguised officer was delivered to Buffardi and communicated to Barnes around December 1994. Buffardi Dep. at 76-77.

Realizing that outright disciplinary action would be "indefensible under the First Amendment," Buffardi Dep. at 85, 89, defendants sought a more creative solution to their problems. With confirmation of Jeffes as the informer in hand, Barnes and Buffardi began showing the tape to Jeffes' co-workers. Buffardi Dep. at 57-58; 81-82; 83-88; Jones Dep. at 67-69; Broderick Dep. at 48, Ex. 22; Jeffes Dep. at 11. Aware that it would make Jeffes a "marked man" and the likely subject of retaliation and harassment, Barnes and Buffardi continued to show this tape while aware that guessing the identity of the "rat" was the "big thing" among jail employees. Broderick Dep. at 46, 59. One of the defendants charged in the federal criminal indictment, the subject of previous disciplinary action and alleged to be "contentious" and "aggressive," encouraged others to "go upstairs and view the tape to see who it really was." Buffardi Dep. at 182-83; Broderick Dep. at 58-59. It does not require much thought to figure out how officers facing a criminal trial as a result of the events alleged in the tape might react to a co-worker who reported such information to the authorities. As sentiment mounted against Jeffes, Keenan, and Carlos once they were labeled as "rats," their co-workers felt

that they no longer belonged at the jail, Broderick Dep. at 50, and efforts were made to "provoke [Jeffes] into doing something or incite him into doing something, [so] we could set him up and then we can get him." Jeffes Dep. at 11; Carlos Dep. at 54. Sheriff Barnes informed Jeffes that he would engage in similar conduct. Jeffes Dep. at 7.

Defendants rely on the plaintiffs' denial of medical benefits[2] by an independent agency and subsequent termination for a failure to report to work to disclaim that any actions by the defendants were motivated by plaintiffs' exercise of free speech. Such reliance is misdirected in that it overlooks the substantive allegations of retaliation and harassment that are the gravamen of the plaintiffs' claim.

Jeffes was characterized as a "rat" in posters around the jail, and some co-workers allegedly threatened his life. Jeffes Aff. at ¶ 4. Radio communications made by Jeffes were interrupted, thus preventing him from communicating with other officers or seeking help if the need arose. Jeffes Dep. at ¶ 7. References to being a "rat" and "snitch" were also made when Jeffes attempted to speak on the radio. Jeffes Aff. at ¶ 8. These radio communications between the officers were monitored by Jeffes' supervisors, defendants Barnes, Buffardi, and Elwell.

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[2] Plaintiffs Jeffes and Keenan each applied for 207-c benefits based on their medical condition and disabilities that were related to their allegations of retaliation and harassment and their ability to function as correction officers. After each plaintiff's application was rejected, they were ordered to return to work. When Jeffes and Keenan failed to do so, they were served with notices of termination.

Jeffes Aff. at ¶¶ 6, 9. Plaintiffs Keenan and Carlos faced a similar reaction from their co-workers after testifying at the Grand Jury investigation and the criminal trial. Keenan Aff. at ¶¶ 3-6; Carlos Dep. at 45-58. These allegations present a genuine issue of material fact whether the plaintiffs' reporting of inmate abuse and officer misconduct were a substantial motivating factor in the alleged retaliation and harassment that was taken against them. *See Bernheim*, 79 F.3d at 325; *see also Colon v. Coughlin*, 58 F.3d at 865, 872 (noting that a "temporal proximity" between initial speech or conduct giving rise to First Amendment protection and subsequent disciplinary action may serve as circumstantial evidence of retaliation).

In balancing the interests of the respective parties, the defendants' actions can hardly stand against the exceptionally strong government interest in investigating alleged civil rights violations. Plaintiffs' were reporting matters of public concern and the alleged actions of the defendant were not aimed at " promoting efficiency and integrity in the discharge of official duties.' " *Connick*, 461 U.S. at 151, 103 S.Ct. at 1692. Rather, plaintiffs became the victims of an alleged campaign of retaliation and harassment initiated by their supervisors and carried out by his co-workers, angered by plaintiffs' reporting of officer misconduct.

Having established that such alleged retaliation and harassment could reasonably have been motivated by plaintiffs' protected speech, the Court must now consider whether plaintiffs have suffered a harm rising to the level of a constitutional deprivation for which they may seek recovery.

C. Constitutional Deprivation

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Supreme Court recognized that there are "deprivations less harsh than dismissal that nevertheless press [government] employees . . . to conform their beliefs and associations to some [government]-selected orthodoxy." *Id.* at 75. Indeed, in a much debated footnote, the Supreme Court indicated that government employees are protected from even trivial acts of retaliation from their employers. *Id.* at 76 n.8. This Court does not intend to further this debate at this time. It need only decide if the allegations, when examined in the aggregate and with all reasonable inferences in favor of the plaintiffs, are sufficient to constitute a legally cognizable claim under section 1983. Whether such action impose liability on the defendants based on their personal involvement is a separate issue, to be discussed later.

After *Rutan*, "the scope of harm actionable under the First Amendment is broader than actual or constructive discharge from employment." *Pierce v. Texas Dep't Of Criminal Justice*, 37 F.3d 1146, 1149 (5th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995). In rejecting the stricter standards employed by other courts, the Supreme Court in *Rutan* held that employment decisions that fall short of the "substantial equivalent of dismissal" are sufficient to establish that a public employee's rights under the First Amendment may have been violated. *Rutan*, 497 U.S. at 74. While analyzed in the context of political patronage activities, this standard has been applied to First Amendment retaliation claims under section 1983. *See Bernheim*, 79 F.3d at 324; *Pierce*, 37 F.3d at 1149; *Dorsett v. Bd. of*

Trustees for State Colleges and Univs., 940 F.2d 121, 123 (5th Cir. 1991).

While recognizing that the "First Amendment is not a tenure provision," the Supreme Court in *Rutan* noted that there are constitutional deprivations that fall short of actual or constructive discharge or disciplinary actions that are sufficient to sustain a claim under section 1983. *See Rutan*, 497 U.S. at 76. In *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), a pre-*Rutan* case that also dealt with First Amendment issues, the Second Circuit arguably adopted a broader standard in such First Amendment cases, covering instances where "unfavorable action" is taken under color of state law against employees exercising their constitutional rights. *See Lieberman*, 857 F.2d at 900. In *Bernheim*, a post-*Rutan* case, the Second Circuit advocated an approach whereby plaintiff's allegations should be viewed in the totality, and did not require actual or constructive discharge as a predicate for a section 1983 claim. *See Bernheim*, 79 F.3d at 325 (noting that an absence of allegations of dismissal from employment is not fatal to plaintiff's claim).

In the present case, both parties offer considerable argument about whether the plaintiffs were constructively discharged as a result of the acts of retaliation and harassment that allegedly forced them to leave their positions.[3] As the *Bernheim* Court noted, allegations of harassment "which caused . . . great worry and unhappiness" may give rise to a compensable injury. *Bernheim*, 79 F.3d

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[3] In fact, only plaintiffs Jeffes and Keenan have left their positions at the County Jail and plaintiff Carlos is still employed at the County Jail. Pl. Local Rule 7.1(f) Stat. at ¶¶ 16, 20.

at 325. The Court will now analyze the plaintiffs' allegations against these established standards.

In *Bernheim*, the plaintiff established a viable section 1983 retaliation claim based on actions by her employer that affected her employment status and allegations of harassment. *See Bernheim*, 79 F.3d at 325. Notably, such claim survived a motion to dismiss even though the allegations did not give rise to an actual or constructive discharge. *Id.* (changes in position and assignments, criticisms, wrongful accusations of timeliness, and efforts to make job more difficult sufficient to sustain First Amendment retaliation claim).

Like the Second Circuit did in *Bernheim*, the Court views the plaintiffs' allegations in their totality in determining whether a legally cognizable claim exists. *See Chertkova*, 92 F.3d at 90 (advocating an analysis of plaintiff's claims cumulatively rather than separately and distinctly). Here, the plaintiffs' allegations, examined in a light most favorable to them, are sufficient to defeat a summary judgment motion. Plaintiffs have alleged that they were the subject of retaliation and harassment for publicly reporting the misconduct of their co-workers. The affidavits and depositions submitted by the parties bare [sic] this out. Such actions included the designation of a "rat" among co-workers that was conveyed on posters and over the radio; an inability to communicate with other officers over the radio if the need arose; threats to their safety; numerous hang-up telephone calls; visits to their home offering "protection" from harm; reassignment of duties and reduced responsibilities; disciplinary action for acts previously accepted by their supervisors; and general threats indicating that co-

workers and supervisors were going to incite problems and make their lives difficult. Plaintiffs' allegations paint a picture of being ostracized from their co-workers and unable to rely on their assistance in the course of their duties. These allegations, when viewed in the aggregate, take on added importance given the nature of the plaintiffs' jobs and the dangers associated with their work. The plaintiffs had a reasonable fear that they could face life-threatening situations unassisted because their requests would go unanswered. Furthermore, because plaintiffs' supervisors were allegedly initiating and encouraging such actions, there was effectively little chance that the situation would be remedied. The focus of the defendants on the fact that plaintiffs retained their rank and pay and their duties reassigned to "lighten their workload" is misplaced in light of the seriousness of the alleged acts of retaliation and harassment that the plaintiffs faced on a daily basis. These alleged acts fall well beyond the merely "juvenile conduct" that the defendants would have the Court believe, and when viewed in their totality, are sufficient to establish a valid section 1983 claim based on First Amendment retaliation. *See Bernheim*, 79 F.3d at 326; *Lieberman*, 857 F.2d at 900. *Compare Dorsett*, 940 F.2d at 123-24 (intrafaculty disputes concerning teaching assignments, administrative duties, and internal department procedures insufficient to sustain claim of constitutional deprivation).

The claims of Jeffes and Keenan can equally survive defendants' summary judgment motions when examined in light of the standards established for a constructive discharge. Constructive discharge occurs when "an employer, rather than directly discharging an individual,

intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily." *Chertkova*, 92 F.3d at 89. Working conditions are deemed intolerable if they are " 'so difficult or unpleasant that a reasonable person in the employee's shoes should have felt compelled to resign.' " *Id.* (quoting *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987)); *Christopher-Ketchum v. Agway Energy Prods.*, 988 F. Supp. 610, 616 (N.D.N.Y. 1997). A claim of constructive discharge cannot be maintained, however, if the employee merely alleges dissatisfaction with the nature of his assignments, *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325-26 (2d Cir. 1983), unfair criticism, *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1160-61 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993), or if the working conditions are difficult or unpleasant. *See Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 360 (2d Cir. 1993).

Here, plaintiffs Jeffes and Keenan have presented evidence sufficient to overcome a motion for summary judgment on the basis of constructive discharge. Based on their allegations, a reasonable person could find that their working conditions were made intolerable by their supervisors and co-workers. Defendants should not be able to disguise their retaliatory and harassing actions behind the thin veil of "reassignment of duties" and no loss in pay or job title. A finding of constructive discharge should not be precluded simply because the employer did not expressly threaten to discharge the employee. Indeed, plaintiffs allege far more subtle techniques employed by their supervisors and co-workers to effectuate a similar result. Assuming the plaintiffs' allegations are true, as we must on a summary judgment motion, one

finds acts of retaliation and harassment set in motion by the defendants and left unchecked. This foreclosed any remedy for the plaintiffs since those that set the policies of the jail and monitored the working conditions of the jail were also responsible for allegedly initiating and permitting the retaliation and harassment. Additionally, plaintiffs allege that the defendants did not investigate reports and concerns of the effect of such internal conflict, leaving the plaintiffs without any avenue of redress. Broderick Dep. at 60 ("I felt this was a definite problem because it was – it would cause maybe an officer to get killed."). When viewed in the aggregate, a trier of fact could reasonably find that such allegations give rise to a claim of constructive discharge. Recognizing that such an inquiry is fact intensive, this Court only decides that such actions are inconsistent with the Constitution and that the plaintiffs' allegations state claims under 42 U.S.C. § 1983 for violations of their First Amendment rights. *See Rutan*, 497 U.S. at 76.

Having found that plaintiffs' established a cognizable constitutional deprivation of their First Amendment rights, the Court proceeds to determine whether the defendants can be held liable for such alleged harm.

D. Supervisory Liability Under § 1983

Much of the defendants' argument focuses on the inability of the plaintiffs to identify defendants Barnes, Buffardi, and Elwell as being personally liable for the alleged acts of retaliation and harassment. In section 1983 claims, personal liability may be predicated upon the actions of the defendants in either their individual or

supervisory capacity. Liability for a failure to supervise or train is premised on a belief that a supervisor is charged with safeguarding against constitutional violations by employees under his control. *See Haynesworth v. Miller*, 820 F.2d 1245, 1259 (D.C. Cir. 1987). However, a finding that a supervisor is liable for wrongdoing does not necessarily require that the municipality be found liable because the supervisor's conduct may not reflect municipal policy. *See id.* However, a claim against a supervisory official can give rise to municipal liability if the supervisor is a policymaker in the area in which the challenged conduct arose. *See id.*

A defendant sued under § 1983 may not be held liable merely because he held a high position of authority. *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Leonhard v. United States*, 633 F.2d 599, 621 n. 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981). Rather, personal involvement in the constitutional violation on the official's part is required. *Black*, 76 F.3d at 74; *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Moffitt v. Town of Brookfield*, 950 F.2d 880, 886 (2d Cir. 1991).

The Second Circuit has construed "personal involvement" in the § 1983 context to mean either direct participation, failure to remedy a wrong after learning of it, creation of a policy or custom by the official under which unconstitutional practices occurred, gross negligence in managing subordinates, or deliberate indifference by failing to act on information alleging unconstitutional acts. *Black*, 76 F.3d at 74; *Colon*, 58 F.3d at 873 (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)); *Wright*, 21 F.3d at 501. A showing of mere negligence on the official's part

will not suffice. *Moffitt*, 950 F.2d at 886 n. 5 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)); *Wise v. New York City Police Department*, 928 F. Supp. 355, 368 (S.D.N.Y. 1996). It is uncertain, however, if the gross negligence standard is sufficient in light of the Supreme Court's decision in *City of Canton v. Harris*, 489 U.S. 378 (1989). *See Moffitt*, 950 F.2d at 886 n.5. Based on these standards, the Court now examines the liability of defendants Barnes, Buffardi, Elwell, and Schenectady County.

a. Defendant Barnes

Plaintiffs concede that they are unable to identify Defendant Barnes as directly engaging in any of the complained acts of retaliation and harassment. Indeed, Barnes relies on this fact in denying any responsibility for the events that allegedly followed after each plaintiff reported instances of officer misconduct at the County Jail. This defense, however, overlooks the affirmative acts taken by Barnes to identify and disclose Jeffes as the disguised informer to his co-workers, and his failure to act after learning about the host of alleged retaliation and harassment that Jeffes, Keenan, and Carlos experienced after publicly reporting officer misconduct and cooperating in the federal investigation and subsequent prosecution.

After spending considerable effort in identifying Jeffes as the disguised officer that reported officer misconduct at the County Jail, Barnes showed a tape of the interview to many of Jeffes' co-workers. Buffardi Dep. at 57-58, 81-88; Barnes Dep. at 66; Jones Dep. at 67-69; Broderick Dep. at 48, Ex, 22; Jeffes Dep. at 11. This takes

on added significance in light of Barnes' awareness that many officers were upset at Jeffes for lying about his involvement in reporting the alleged misconduct. Barnes Dep. at 332; Buffardi Dep. at 61. Barnes also made threats against Jeffes. Jeffes Dep. at 7, 11. He also received reports from other officers stating their concerns for the plaintiffs' safety and that radio communications were being hindered, and that continued harassment was lodged against the plaintiffs. Broderick Dep. at 60; Barnes Dep. at 316; Marchinkowski Dep. at 64. Barnes, as Sheriff, was charged with responsibility for monitoring conduct in the jail, and disciplining those employees that violated the rules. Plaintiffs allege, however, that Barnes refused to conduct such an investigation or monitoring of officer misconduct. Although the record is less clear as to the nature, if any, of any investigation undertaken by Barnes, a reasonable fact-finder could infer that there was little chance that Barnes would act in light of the allegations that he initiated much of the acts of retaliation and harassment complained of by the plaintiffs. The complaints alleged by the plaintiffs reasonably should have prompted Barnes to conduct an investigation. *See Colon*, 58 F.3d at 873.

Examining plaintiffs' claims as a whole, this Court finds that a reasonable fact-finder could conclude that Barnes should have known that identifying Jeffes as the informer and subsequently failing to act when informed of numerous alleged instances of retaliation and harassment upon the plaintiffs, some of which threatened their safety, would continue to expose the plaintiffs to extreme hostility from their co-workers and make working conditions intolerable. Indeed, through his own monitoring of

the daily activities at the jail, and reports of employee conflict and safety concerns communicated to him, Barnes "reasonably should have [been] prompted" to investigate and remedy such concerns. *Colon*, 58 F.3d at 873.

Officers Keenan and Carlos have alleged similar acts of retaliation and harassment. Barnes stated that Keenan "did not have any loyalty to the department and the sheriff," Giacumo Dep. at 10, and threatened Carlos by stating that, "you're gonna get yours," and "we're gonna get ya." Carlos Dep. at 58.

In short, plaintiffs have presented evidence that would create a triable issue of fact regarding Barnes' supervisory liability based on his direct participation in the alleged constitutional violations, a deliberate indifference or tacit authorization to such acts, and a failure to remedy the acts of retaliation and harassment of which he became aware. Therefore, the Court finds that the plaintiffs' allegations are sufficient to withstand Barnes' motion for summary judgment.

b. Defendant Buffardi

Buffardi participated in the considerable efforts made to identify Jeffes as the disguised officer on the taped interview. Buffardi Dep. at 36-40; 64-76. At the request of Barnes, Buffardi showed the tape to other correction officers. Buffardi Dep. at 81-82; Broderick Dep. at Ex. 22; Elwell Dep. at 115; Pollard Dep. at 54. This, by itself, is sufficient for a reasonable fact-finder to infer Buffardi's direct participation in the alleged wrongdoing. As Undersheriff, Buffardi, like Barnes, shared responsibility for the

overall supervision of employee activities and was responsible for disciplining officers for acts of misconduct. Although made aware of the problems, through discussions with other officers and by his regular monitoring of activities within the jail, Buffardi allegedly failed to act. These problems were also discussed directly with Barnes. Barnes Dep. at 316-17; Buffardi Dep. at 166-68. Plaintiffs allege that Buffardi refused to investigate alleged acts of retaliation and harassment brought to his attention. Like Barnes, it is reasonable to infer that Buffardi had little incentive to remedy the wrongs alleged by the plaintiffs given his direct involvement in identifying Jeffes as the informer and disclosing this fact by subsequently showing the tape to Jeffes' co-workers.

In short, plaintiffs have presented evidence that would create a triable issue of fact as to Buffardi's supervisory liability based on his direct participation in the alleged constitutional violations, a deliberate indifference or tacit authorization of such acts, and a failure to remedy the acts of retaliation and harassment of which he became aware. Therefore, the Court finds that the plaintiffs' allegations are sufficient to withstand Buffardi's motion for summary judgment.

c. Defendant Elwell

Major Elwell, too, shared responsibility for monitoring employee conduct and investigating claims of officer misconduct that could result in disciplinary action. It is reasonable for the plaintiffs to infer that Elwell would respond to their complaints of retaliation and harassment and attempt to remedy any employee conflict. Plaintiffs,

however, allege that Elwell failed to act, thus demonstrating a tacit authorization for the alleged actions taken by plaintiffs' co-workers. Indeed, Elwell was made aware of some of these instances by other officers. Broderick Dep. at 53; Carlos Dep. at 47-48, 62.

While the record is unclear whether Elwell conducted any investigation into plaintiffs' claims, it is reasonable to infer that such concerns merited an investigation on Elwell's part. *See Colon*, 58 F.3d at 873. Because plaintiffs have alleged that Elwell had actual and constructive knowledge of acts of retaliation and harassment, there exists a triable issue of fact whether Elwell failed to act after learning of these acts, or demonstrated deliberate indifference to these claims by failing to act when made aware of them. A failure to act was likely to expose plaintiffs to continued hostility from other corrections officers. Therefore, the Court finds that the plaintiffs' allegations are sufficient to withstand Elwell's motion for summary judgment.

E. Schenectady County

Recognizing that not every decision by a municipal employee automatically imposes liability on the municipality, courts have disallowed claims under section 1983 on a respondeat superior theory. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. Because *Monell* and its progeny focus on

responsibility for alleged wrongs, municipal liability does not attach unless the municipality's policies are the "moving force" behind the constitutional violations. *Board of the County Comm'rs of Bryan County v. Brown*, ___ U.S. ___, 117 S.Ct. 1382, 1389 (1997); *City of Canton*, 489 U.S. at 388. Courts have had considerable difficulty, however, in determining whether particular decisions made by municipal officers represents municipal policy. Express acceptance by the County for the defendants' actions is not a prerequisite to the imposition of municipal liability. *See Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied sub nom., County of Monroe v. Weber*, 483 U.S. 1020 (1987) (noting that section 1983 preempts state law and a county can be liable for its established policies, custom, and practice).

The courts have articulated guidelines under which municipal liability may be imposed. These include: (1) an officially promulgated policy sanctioned or ordered by the municipality, see *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); *Monell*, 436 U.S. at 690; (2) a pervasive custom or practice approved of by the municipality or which the municipality is aware or should be aware, see *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985); *Monell*, 436 U.S. at 690; (3) a single act taken by the municipal employee who, as a matter of state law, has final policymaking authority with respect to the area in which the action is taken, see *McMillan v. Monroe County*, ___ U.S. ___, 117 S.Ct. 1734, 1736 (1997); *Praprotnik*, 485 U.S. at 129-30; *Pembaur*, 475 U.S. at 480-83; or (4) where the failure of the municipality to train its employees rises to the level of deliberate indifference to the constitutional

rights of others, see *City of Canton*, 489 U.S. at 388; *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993). The plaintiff in a section 1983 claim bears the burden of establishing municipal liability. *See Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985), *cert. denied*, 480 U.S. 916 (1987); *Dominguez v. Beame*, 603 F.2d 337, 341 (2d Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

1. Official Policy

Plaintiffs have not presented any evidence to establish that a formal "policy statement, ordinance, regulation, or decision was officially adopted and promulgated" by Schenectady County authorizing acts of retaliation and harassment against those employees that exercised their First Amendment rights by publicly reporting officer misconduct. *Monell*, 436 U.S. at 689. Accordingly, municipal liability cannot be established on this ground.

2. Approved Custom of Practice

Plaintiffs also fail to offer any evidence of the existence of any widespread practice, express or otherwise, authorizing acts of retaliation and harassment in cases where employees exercise their First Amendment rights, that would establish a permanent or well settled custom or usage with equal force of law. *See Board of County Comm'rs*, ___ U.S. ___, 117 S.Ct. at 1388; *Praprotnik*, 485 U.S. at 127 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68). Therefore, municipal liability cannot be established on this ground.

3. Municipal Employee with Final Policymaking Authority

This ground provides the source of most of the contention and misunderstanding between the parties on the issue of municipal liability. This issue involves two questions: (1) whether the defendants were policymakers for the state or the county; and (2) whether the defendants had *final* policymaking authority for the municipality concerning the actions alleged to have caused the constitutional deprivation. *See McMillan*, ___ U.S. ___, 117 S.Ct. at 1736. These necessarily implicate questions of state law that must be decided by the Court. *See id.*, ___ U.S. ___, 117 S.Ct. at 1737; *Jett v. Dallas Indep. Sch. Sys.*, 491 U.S. 701, 737 (1989) (citing *Praprotnik*, 485 U.S. at 124); *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1120 (6th Cir. 1994).

The Court notes that Schenectady County's potential liability for the actions of Sheriff Barnes has been already visited by another court within this district. *See O'Connor v. Barnes et al.*, 97 CV 1489 (N.D.N.Y. March 18, 1998). In *O'Connor*, the court found that Sheriff Barnes was a policymaker for Schenectady County and that he had final policymaking authority for the actions allegedly giving rise to the constitutional violations. *See id.* at 14-20. The *O'Connor* court, however, was deciding defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and its decision was based on whether "it [was] clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 7-8 (citing *H.J. Inc. v. Northwest Bell Tel. Co.*, 492 U.S. 229, 249-50). This Court, however, in deciding defendant's summary judgment motion, has the benefit of examining

additional affidavits and depositions that were not previously available.

The Supreme Court in *Pembaur* made a critical distinction when a municipal official exercising policymaking authority on behalf of the municipality does not necessarily rise to the level of *final* policymaking authority:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if the county employment policy was set by [an independent county board], only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would represent county policy and could give rise to municipal liability.

Pembaur, 475 U.S. at 484 n.12. Because a municipal official functions as a policymaker by the nature of his position, courts have required that such official exercise final policymaking authority in an area in order for the official's

actions to represent official policy and bind the municipality. This standard attaches municipal liability only where the "decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481. Notably, municipal liability would not be imposed even though the policymaker had discretion to act in a particular area. *See id.* at 482. This distinction is critical in avoiding the imposition of municipal liability under a respondeat superior theory. The Court is mindful, however, that such final policymaking authority can be established by the single act of a municipal employee. *See id.* at 481.

Schenectady County has stipulated that Sheriff Barnes was a policymaker for the County. *See* Attorney Aff. in Support of Motion for Summary Judgment at ¶ 17; *O'Connor,* 97 CV 1489 at 17. The Court therefore accepts this proposition. *Accord Isereau v. State,* 139 N.Y.S.2d 739, 743 (N.Y. Ct. Cl. 1954), *aff'd,* 160 N.Y.S.2d 839 (4d Dept. 1957) ("Though the office of Sheriff is organized under the authority of the State, a Sheriff is classified as a local officer . . . [whose] duties are prescribed by county law."). The more difficult question, however, is whether Sheriff Barnes exercised final policymaking authority with respect those actions alleged to have violated the plaintiff's constitutional rights.

In assessing whether a municipal official possesses final policymaking authority in a given area, the critical distinction "is between the establishment of policy and the exercise of discretion in enforcing existing policy." 1B SCHWARTZ & KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES at § 7.15. A municipal official that exercises

discretion, whether it be in a constitutional or unconstitutional manner, in an area in which that official is not the final policymaker, cannot, by itself, establish municipal liability. *See Praprotnik*, 485 U.S. at 139-40 (Brennan, J., concurring); *Pembaur*, 475 U.S. at 481-82. Accordingly, plaintiffs must demonstrate that Sheriff Barnes was acting as the final policymaker, and not merely exercising his discretion, in that aspect of municipal policy that caused the alleged constitutional deprivation. This requires the Court to determine what municipal policies were implicated by the actions allegedly taken by the Sheriff. Here, plaintiffs' claim is premised on their contention that the Sheriff was the final policymaker with respect to the acts of retaliation and harassment alleged by the plaintiffs.

The cases addressing this issue have made a distinction between policies involving law enforcement matters and those involving employment and personnel matters. *See McMillan*, ___ U.S. ___, 117 S.Ct. at 1734 (sheriff a final policymaker for the state with respect to law enforcement matters); *Jett*, 491 U.S. at 701 (employee transfers); *Praprotnik*, 485 U.S. at 112 (director of local city agency not a final policymaker for matters involving retaliatory transfers or layoffs); *Pembaur*, 475 U.S. at 469 (county sheriff and prosecutor could establish municipal policy with respect to law enforcement matters). In the present case, the plaintiffs allege that retaliatory actions were initiated and encouraged by Sheriff Barnes in response to plaintiffs' exercise of their First Amendment right of free speech. Indeed, plaintiffs allege that the retaliation and harassment occurred in the workplace and adversely affected the manner in which they carried out their assigned duties. These allegations fit squarely within the

context of employment or personnel matters. *See Praprotnik*, 485 U.S. at 113. The Court must now determine whether the Sheriff was "speak[ing] with final policymaking authority" for Schenectady County in this area. *Jett*, 491 U.S. at 737.

In a factual setting similar to the present case, the Supreme Court in *Praprotnik* dealt with plaintiff's allegations that his First Amendment rights were violated through a retaliatory transfer taken in response to plaintiff's appeal of a prior suspension. *See Praprotnik*, 485 U.S. at 116. The Supreme Court characterized the retaliatory actions as involving matters of "personnel administration" and "employment policy," *id.* at 128-29, and found that the city officials were not authorized under the city charter to establish employment policy for the municipality, and were therefore merely exercising discretion rather than formulating municipal policy. *See id.* at 129-30. Moreover, the Supreme Court noted that those parties charged with final policymaking authority for such employment matters had not enacted any ordinance "designed to retaliate against . . . similarly situated employees." *Id.* at 128.

While these cases provide general guidelines in which to operate, any final determination with respect to the challenged actions in the present case depends on applicable state and/or local law. *See id.* at 123. Plaintiffs, however, fail to establish, as a matter of law, that the Sheriff was acting in an area of municipal policy in which he was charged with final policymaking authority under applicable state or county law. Additionally, plaintiffs have not established that those persons responsible for municipal employment policy enacted an ordinance or

adopted a custom or policy which permitted such retaliatory conduct. Accordingly, liability cannot be imposed, as a matter of law, on Schenectady County based on plaintiffs' claim that the Sheriff was acting as the final policymaker with respect to the actions alleged to have caused the constitutional deprivation.

4. Failure to Train

In *City of Canton*, 489 U.S. at 378, the Supreme Court established deliberate indifference as the standard for imposing municipal liability for inadequate training. A municipality may be held liable for its deliberate indifference based on its affirmatively adopted policies and its failure to adopt a policy necessary to prevent probable constitutional violations by its employees. *See* 1B SCHWARTZ & KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES at § 7.8. The need for training must be " 'so obvious,' that the failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *City of Canton*, 489 U.S. at 390 n.10 (providing, as an example, training on the constitutional limitations of excessive force given the use of firearms by police officers). However, liability should not necessarily attach because the training program was negligently administered or where additional training would have avoided the challenged conduct. *See id.* at 391. The Supreme Court set this standard high to avoid courts from engaging in a process where it is required to second-guess the merits of municipality training programs. *See id.* at 392.

To establish a claim of municipal liability under section 1983 for a failure to train, the plaintiff must show

that: (1) "policymaker must know 'to a moral certainty' that her employees will confront a given situation"; (2) "the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation"; and (3) "the wrong choice by the city employee will frequently cause the deprivation of a citizens's constitutional rights." *Walker*, 974 F.2d at 297.

Plaintiffs must first demonstrate that training was necessary to remedy an obvious and recurring problem. *See City of Canton*, 489 U.S. at 390; *Walker*, 974 F.2d at 297. Plaintiffs fail to meet this initial requirement. A failure to train employees for "rare or unforeseen events" can not rise to the level of deliberate indifference. *Walker*, 974 F.2d at 297. Schenectady County alleges that the conduct identified by the plaintiffs to be addressed by training had not occurred in the past twenty years. Hayner Aff. at ¶ 2. Other than generalized allegations, plaintiffs do not provide any evidence that Schenectady County was aware that the alleged retaliatory conduct had occurred or that employees had historically mishandled similar situations. *See Walker*, 974 F.2d at 297. Plaintiffs contend that because courts are "replete with claims of inmates alleging excessive force by guards," the Sheriff was effectively put on notice that such events could occur at the jail. Pl. Mem. of Law at 26. This contention is over-generalized and fails to establish any awareness on the part of Schenectady County. Plaintiffs have presented no evidence showing that Schenectady County made a deliberate choice not to train its employees under circumstances alleged by the plaintiffs, and therefore cannot be said to rise to the level of municipal policy. *Accord City of Canton*, 489 U.S. at 388.

Any imposition of liability on the County under such circumstances would be tantamount to respondeat superior liability which the courts have clearly held is insufficient to establish section 1983 liability. *See Board of County Comm'rs*, ___ U.S. ___, 117 S.Ct. at 1388. The Court, therefore, finds plaintiffs' claims of a failure to train to be without merit.

Plaintiffs have not presented allegations sufficient to impose liability on Schenectady County for the actions taken by its municipal employees. Accordingly, the Court grants Schenectady County's motion for summary judgment and dismisses all claims therein against Schenectady County.

III. CONCLUSION:

For all of the foregoing reasons, then, it is hereby **ORDERED,**

that defendants' motion for summary judgment seeking dismissal of plaintiffs' claims against defendants Barnes, Buffardi, and Elwell in their official capacities is **GRANTED,** and it is further

ORDERED, that defendants' motion for summary judgment seeking dismissal of plaintiffs' claims against defendants Barnes, Buffardi, and Elwell in their personal capacities is **DENIED,** and it is further

ORDERED, that Schenectady County's motion for summary judgment is **GRANTED**, dismissing the claims against Schenectady County.

IT IS SO ORDERED.

Binghamton, New York
September 15, 1998

/s/ Thomas J. McAvoy
Chief U.S. District Judge

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York County Law

§ 650. General duties of sheriff

1. The sheriff shall perform the duties prescribed by law as an officer of the court and conservator of the peace within the county. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors or the county legislature.

2. Upon written request by the issuer thereof, the sheriff shall serve all civil process regardless of whether it has been issued by the court.

New York Correction Law

§ 500-c. Custody and control of prisoners

Each sheriff, except the sheriff of the city of New York, sheriff of the county of Westchester and the sheriff of the county of Monroe, shall have custody of the county jails and shall receive and safely keep, in the county jail of his county, every person lawfully committed to his custody for safekeeping, examination or trial, or as a witness, or committed or sentenced to imprisonment thereto or committed for contempt. In the counties within the city of New York, the city commissioner of correction, and in the county of Westchester, the county sheriff, shall have custody of civil jails and shall safely keep every person lawfully committed to his custody. In the county of Monroe, any part of the Monroe county jail under the jurisdiction of the commissioner of community corrections which shall be set aside for the accommodation of prisoners detained by civil process shall be under the custody and control of the sheriff and he shall safely keep such persons lawfully committed to his custody. A sheriff, the New York city commissioner of correction, the Westchester county commissioner of correction or the commissioner of community corrections of the county of Monroe, as the case may be, shall not be held personally liable for receiving and/or detaining any person under and in accordance with a commitment issued by a judicial officer; nor shall he, without lawful authority, let any such person out of jail. Persons in custody on civil process, or committed for contempt, or detained as witnesses, shall not be put or kept in the same room with persons detained for trial or examination upon a criminal

charge, or with convicts under sentence. Persons detained for trial or examination upon a criminal charge shall not be put or kept in the same room with convicts under sentence. Persons under the age of twenty-one years shall not be put or kept in the same room with prisoners twenty-one years of age or older. The foregoing requirements for the segregation of persons, including persons under the age of twenty-one years, committed to the custody of a sheriff, the New York city commissioner of correction, the Westchester county commissioner of correction or the commissioner of community corrections of the county of Monroe may be waived, in the discretion of such sheriff, New York city commissioner of correction, the Westchester county commissioner of correction or the commissioner of community corrections of the county of Monroe, for the sole purpose of enabling such persons to participate in educational, vocational, divine worship and with the consent of said person, recreational programs conducted within the jail. A woman detained in any county jail or penitentiary upon a criminal charge, or as a convict under sentence, shall not be kept in the same room with a man; and if detained on civil process, or for contempt, or as a witness, she shall not be put or kept in the same room with a man, except with her husband, in a room in which there are no other prisoners. In the conduct of educational, vocational or divine worship programs, the strict separation of sexes need not be followed. If a woman committed to or confined in any county jail or penitentiary is then pregnant or is the mother of a nursing child in her care, under one year of age, or is the mother of and has exclusive care of a child more than one year of age, such mother and her child or children shall

be subject to the provisions of section six hundred eleven of this chapter. All persons confined in a county jail or penitentiary shall, as far as practicable, be kept separate from each other, and shall be allowed to converse with their counsel, or religious adviser, under such reasonable regulations and restrictions as the keeper of the jail may fix. Convicts under sentence shall not be allowed to converse with any other person, except in the presence of a keeper. The keeper may prevent all other conversations by any other prisoner in the jail when he shall deem it necessary and proper.

New York Correction Law

§ 40. Definitions

As used in this article the following terms have the following meanings:

1. "Commission" means the state commission of correction.

2. "Local correctional facility" means any county jail, county penitentiary, county lockup, city jail, police station jail, town or village jail or lockup, court detention pen or hospital prison ward.

3. "Correctional facility" means any institution operated by the state department of correctional services, any local correctional facility, or any place used, pursuant to a contract with the state or a municipality, for the detention of persons charged with or convicted of a crime.

4. "Municipal official" means (a) the sheriff or, where a local correctional facility is under the jurisdiction of a county department, the head of such department, and clerk of the board of supervisors, in the case of a county jail; (b) the sheriff or other officer having custody or administrative jurisdiction and the clerk of the board of supervisors, in the case of a county penitentiary; (c) the clerk of the board of supervisors in the case of a county lockup; (d) the mayor and the city clerk, in the case of a city jail or police station jail; (e) the supervisor and town clerk, in the case of a town jail or lockup; (f) the mayor and village clerk, in the case of a village jail or lockup; (g) the clerk of the board of supervisors of the county wherein located and the officer having custody or control, in the case of a court detention pen or a hospital prison ward.

5. "Board" means the correction medical review board.

6. "Council" means the citizen's policy and complaint review council.

New York Correction Law

§ 112. Powers and duties of commissioner of correction relating to correctional facilities

1. The commissioner of correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof. He shall have the power and it shall be his duty to inquire into all matters connected with said correctional facilities. He shall make such rules and regulations, not in conflict with the statutes of this state, for the government of the officers and other employees of the department assigned to said facilities, and in regard to the duties to be performed by them, and for the government and discipline of each correctional facility, as he may deem proper, and shall cause such rules and regulations to be recorded by the superintendent of the facility, and a copy thereof to be furnished to each employee assigned to the facility. He shall also prescribe a system of accounts and records to be kept at each correctional facility, which system shall be uniform at all of said facilities, and he shall also make rules and regulations for a record of photographs and other means of identifying each inmate received into said facilities. He shall appoint and remove, subject to the civil service law and rules, subordinate officers and other employees of the department who are assigned to correctional facilities.

2. The commissioner of correction may require reports from the superintendent or any other officer or employee of the department assigned to any correctional

facility in relation to his conduct as such officer or employee, and shall have the power to inquire into any improper conduct which may be alleged to have been committed by any person at any correctional facility, and for that purpose to issue subpoenas to compel the attendance of witnesses, and the production before him of books, writings and papers. A subpoena issued under this section shall be regulated by the civil practice law and rules. The commissioner of correction is authorized and empowered to lease the railroad, constructed under and by the authority of the laws of eighteen hundred and seventy-eight, chapter one hundred and forty-eight, for such term of years and upon such terms and conditions as shall be approved of, in writing, by the governor and comptroller of this state.

3. It shall be the duty of the commissioner of correction to provide an electrical apparatus suitable and sufficient for the infliction of the punishment of death as provided by section six hundred sixty-two of this chapter, together with the necessary machinery and appliances for the execution of convicted criminals.

New York Correction Law

§ 45. Functions, powers and duties of the commission

The commission shall have the following functions, powers and duties:

1. Advise and assist the governor in developing policies, plans and programs for improving the administration of correctional facilities and the delivery of services therein.

2. Make recommendations to administrators of correctional facilities for improving the administration of such correctional facilities and the delivery of services therein.

3. Visit, inspect and appraise the management of correctional facilities with specific attention to matters such as safety, security, health of inmates, sanitary conditions, rehabilitative programs, disturbance and fire prevention and control preparedness, and adherence to laws and regulations governing the rights of inmates.

4. Establish procedures to assure effective investigation of grievances of, and conditions affecting, inmates of local correctional facilities. Such procedures shall include but not be limited to receipt of written complaints, interviews of persons, and on-site monitoring of conditions. In addition, the commission shall establish procedures for the speedy and impartial review of grievances referred to it by the commissioner of the department of correctional services.

5. Ascertain and recommend such system of employing inmates of correctional facilities as may, in the opinion of said commission, be for the best interest of the

public and of said inmates and not in conflict with the provisions of the constitution or laws of the state relating to the employment of inmates.

6. Promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities. Such rules and regulations shall be forwarded to the governor, the temporary president of the senate and the speaker of the assembly no later than January first, nineteen hundred seventy-six and annually thereafter.

6-a. Promulgate rules and regulations to assure that persons in custody in local correctional facilities, including persons awaiting arraignment, are furnished or have access to the type of food required by their religious dietary rules or medically prescribed diets, if any.

7. Place such members of its staff as it deems appropriate as monitors in any local correctional facility which, in the judgment of the commission, presents an imminent danger to the health, safety or security of the inmates or employees of such correctional facility or of the public.

8. Close any correctional facility which is unsafe, insanitary or inadequate to provide for the separation and classification of prisoners required by law or which has not adhered to or complied with the rules or regulations promulgated with respect to any such facility by the commission pursuant to the provisions of subdivision six; provided, however, that before such facility may be closed, the commission shall cause a citation to be mailed to the appropriate municipal or other official at least ten

days before the return day thereof directing the responsible authorities designated to appear before such commission at the time and place set forth in the citation, and show cause why such correctional facility should not be closed. After a hearing thereon or upon the failure to appear, such commission is empowered to order such facility designated in the citation closed within twenty days, during which time the respondent authority may review such order in the manner provided in article seventy-eight of the civil practice law and rules, in the Supreme court. Fifteen days after the order to close has been served by a registered letter upon the appropriate official if no court review has been taken, and fifteen days after the order of such commission has been confirmed by the court, in case of court review, such facility designated in the order shall be closed, and it shall be unlawful to confine or detain any person therein and any officer confining or detaining any person therein shall be guilty of a class A misdemeanor.

9. For the purpose of providing for adequate care, custody, correction, treatment, supervision, discipline and other correctional programs for all persons confined in correctional facilities, the commission shall establish, maintain and operate a correctional training program for such personnel employed by correctional facilities as the commission shall deem necessary. Such program shall be satisfactorily completed by such personnel prior to their undertaking their duties or within one year following the date of their appointment or at such times as the commission may prescribe; provided, however, the commission may exempt from such requirement (i) personnel

employed by any correctional facility which, in the opinion of the commission, maintains and operates a basic correctional training program of a standard equal to or higher than that established, maintained and operated by the commission, and (ii) such personnel employed by any correctional institution as of the effective date of this section who, in the opinion of the commission, possess sufficient qualifications for the care, custody, correction, treatment, supervision and discipline of persons confined in correctional facilities. The cost of such program shall be borne by the commission within the amount available therefor by appropriation; provided, however, that the salary and actual expenses of personnel engaged in such program shall be borne by the correctional facility employing them.

9-a. For the purpose of providing for adequate care, custody, correction, treatment, supervision, discipline and other correctional programs for all persons confined in local correctional facilities, the commission shall promulgate rules and regulations for the certification of part-time local correctional offices employed by local correctional facilities who have satisfactorily completed an in-service correctional training program sponsored by the local correctional facility. The program shall include the same instruction which is given to local correctional officers who attend training sessions which are sponsored by the commission.

10. Approve or reject plans and specifications for the construction or improvement of correctional facilities.

11. Collect and disseminate statistical and other information and undertake research, studies and

analyses, through the personnel of the commission or in cooperation with any public or private agency in respect to the administration, programs, effectiveness and coordination of correctional facilities.

12. Make an annual report to the governor and legislature concerning its work and the work of the board and the council during the preceding year, and such further interim reports to the governor, or to the governor and legislature, as it shall deem advisable, or as shall be required by the governor.

13. Accept, with the approval of the governor, as agent of the state any grant, including federal grants, or any gift for any of the purposes of this article. Any moneys so received may be expended by the commission to effectuate any purpose of this article, subject to the same limitations as to approval of expenditures and audit as are prescribed for state moneys appropriated for the purposes of this article.

14. Enter into contracts with any person, firm, corporation, municipality, or governmental agency.

15. Adopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of the functions, powers and duties of the commission.

16. Do all other things necessary or convenient to carry out its functions, powers and duties expressly set forth in this article.

New York Penal Law

§ 195.00 Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit to deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.